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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

		Page
A.	Opinion of United States Court of Appeals for the Second Circuit	1a
B.	Opinion of United States District Court for the Eastern District of New York	46a
C.	Judgment of United States Court of Appeals for the Second Circuit	88a
D.	Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing	90a
E.	Entrapment Charge Given by the United States District Court for the Eastern District of New York	92a

APPENDIX A

Opinion of the Court of Appeals
705 F.2d 603 (2d Cir. 1983)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 168, 424—August Term, 1982

(Argued October 7, 1982 Decided April 5, 1983)

Docket Nos. 82-1111, 82-1123

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRISON A. WILLIAMS, JR. and ALEXANDER FEINBERG,

Defendants-Appellants.

Before:

FRIENDLY, NEWMAN, and KEARSE,
Circuit Judges.

Appeal from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge), after a jury trial at which a former United States Senator and his associate were

found guilty of bribery and related offenses arising out of the Abscam investigation.

Affirmed.

ERWIN N. GRISWOLD, Washington, D.C., and George J. Koelzer, New York, N.Y. (Claire L. Shapiro and Jones, Day, Reavis & Pogue, Washington, D.C., and Joel N. Kreizman, John P. Croake, and Evans, Koelzer, Marriott, Osborne & Kreizman, New York, N.Y., on the briefs), *for defendant-appellant Williams.*

CAROL PRENDERGAST, New York, N.Y. (Harry C. Batchelder, Jr., Susan D. Bauer, Glenn Bogdonoff, and Shelly R. Rossoff, New York, N.Y., on the brief), *for defendant-appellant Feinberg.*

NEWMAN, *Circuit Judge*:

Harrison A. Williams, Jr., formerly United States Senator from New Jersey, and Alexander Feinberg, an attorney and close friend of Williams, appeal from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge) after a jury trial on bribery and related charges arising out of the Abscam undercover "sting" operation. We have previously explored the factual background of Ab-

scam and many of the legal issues arising from this controversial undertaking in upholding the sufficiency of the indictments against four Congressmen and three of their associates, *United States v. Myers*, 635 F.2d 932 (2d Cir.) (*Myers I*), *cert. denied*, 449 U.S. 956 (1980); *United States v. Murphy*, 642 F.2d 699 (2d Cir. 1980), and in affirming their convictions, *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) (*Myers II*), *petitions for cert. filed*, 51 U.S.L.W. 3554, 3555, 3567 (U.S. Jan. 14, 17, 1983) (Nos. 82-1183, -1199, -1255). The evidence against Williams and Feinberg differs in significant respects from that presented in previous Abscam trials, but the major legal issues are similar. In light of our holdings in *Myers I* and *Myers II* and for the more particular reasons detailed in this opinion, we affirm the judgments of conviction.

I.

Williams and Feinberg were charged in a nine-count indictment, along with co-defendants Angelo J. Errichetti, formerly Mayor of Camden, New Jersey, and George Katz, a New Jersey businessman.[1] Errichetti was severed after his conviction in the *Myers* trial, and Katz was severed for health reasons and has since died. The indictment alleged a conspiracy and eight substantive violations, arising out of Williams' conduct, aided and abetted by Feinberg, in promising to use his position as a United States Senator to help obtain government contracts for the purchase of titanium from a mining venture in which the defendants held an interest. The promises were alleged to have been made in connection with two

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1 We have previously rejected pretrial challenges to the indictment. *United States v. Williams*, 644 F.2d 950 (2d Cir. 1981).

transactions, the first, a proposed loan of $100 million ostensibly to have been financed by a fictitious entity known as Abdul Enterprises, Ltd. This entity, purporting to be an enterprise of two wealthy Arab sheiks, was the cover of an elaborate "sting" operation conducted by agents of the Federal Bureau of Investigation. *See Myers II*, *supra*, 692 F.2d at 829-30. The second transaction, also proposed by the Abscam operatives, involved a second Arab group's offer to purchase the mining venture for a sum that would have yielded all the owners of the venture an estimated $70 million profit. For each transaction the indictment charged four offenses: bribery, in violation of 18 U.S.C. § 201(c) (1976) (Counts Two and Six); receipt of an unlawful gratuity, in violation of 18 U.S.C. § 201(g) (Counts Three and Seven); conflict of interest, in violation of 18 U.S.C. § 203(a) (Counts Four and Eight); and interstate travel to carry on the unlawful activity of bribery, in violation of 18 U.S.C. § 1952 (Counts Five and Nine).[2] Count One charged a conspiracy to defraud the United States and to commit the substantive bribery, unlawful gratuity, and conflict-of-interest offenses, in violation of 18 U.S.C. § 371.

A jury trial began on March 30, 1981, and concluded on May 1, 1981. The jury found both defendants guilty on all nine counts. From June 22 to June 25, 1981, the District Court conducted a "due process" hearing to assess various post-trial claims, including the defendants' basic contention that the Government's conduct of the Abscam investigation exceeded the standard of fairness

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2 Counts Two through Four alleged that Senator Williams sought and agreed to receive a loan of money for a business enterprise in which he had an interest and sought and agreed to receive shares of stock in the enterprise. Count Five referred only to the shares of stock. Counts Six through Nine alleged that Senator Williams sought and agreed to receive a sum of money as proceeds from the sale of the enterprise.

mandated by the Due Process Clause of the Fifth Amendment. On December 22, 1981, Judge Pratt issued a comprehensive opinion rejecting all of the defendants' claims, except Feinberg's motion for judgment of acquittal on Count Five for insufficiency of the evidence, which was granted. *United States v. Williams*, 529 F. Supp. 1085 (E.D.N.Y. 1981). Thereafter Judge Pratt sentenced Williams to three years' imprisonment and fines totalling $50,000; Feinberg received a sentence of three years' imprisonment and fines totalling $40,000.

II.

The Government's evidence against Williams and Feinberg revealed transactions more elaborate than those of the Congressmen in *Myers* who accepted $50,000 in cash in exchange for their promises to help secure private immigration legislation. Despite the complexity and higher stakes, however, the essentials of the criminal conduct in this case remained straightforward: a public official's seeking monetary benefit in exchange for his promise to use his official position.

The background events were recounted by Henry A. ("Sandy") Williams, III, a friend and business associate of Senator Williams but not a relative, who testified for the Government after receiving a grant of immunity. In 1975 Sandy Williams became aware of a mining property in Piney River, Virginia. The property was initially thought to be rich in phosphorus and, later, in titanium. Sandy Williams acquired an option on the property for Penque Williams, Inc., a corporation owned equally by him and an associate. Upon acquiring the option in 1975, Sandy Williams discussed the property with Senator Williams and told him that considerable help would be

needed to get the venture started. The Senator assured Sandy Williams that he would "give us all the help that he could possibly give us" and, as Sandy Williams further testified, "for that we agreed that he would get one half of my interest in Penque Williams, Inc." In 1976 Sandy Williams obtained enough financing to exercise the option on the Piney River property and formed a new corporation, United States Titanium Corporation, to take title to the property. Sandy Williams held a 28-1/3% interest in the new corporation, and on March 23, he executed a document acknowledging that half of his interest (approximately 14%) was owned by the Senator. The Senator retained the document in his Senate office files.[3] For three years nothing happened, since the mining venture lacked the necessary capital, estimated by Sandy Williams to be $13 million. Enter Abdul Enterprises, Ltd., the fictitious entity created by the Federal Bureau of Investigation as a source of funds ostensibly supplied by two Arab sheiks looking for investment opportunities.

The Loan Transaction

As the *Myers* case reveals, one of the first politicians to become interested in the prospect of obtaining money from Abdul Enterprises was Angelo Errichetti, then the Mayor of Camden, New Jersey, and a member of the New Jersey Senate. In January 1979, Errichetti mentioned to his friend Senator Williams that he had established con-

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3 At trial the Senator sought to dispel the significance of the 1976 document. Though the point is irrelevant in view of the Senator's 1979 receipt of stock certificates evidencing his share of the venture, we note that in a recorded conversation on September 11, 1979, when the tax consequences of a sale of the venture were discussed, the Senator stated, "We can put our investment back to the beginning of Piney River for the capital gains," a date Sandy Williams reminded the Senator was 1976.

tact with wealthy Arab investors. Williams' reaction was to tell his long-time friend and associate, attorney Alexander Feinberg, to contact Errichetti and "see what the hell's going on." By this time Feinberg had acquired a percentage of the mining venture in return for his looking after the Senator's interests and helping to make presentations to potential investors. Feinberg, Errichetti, and Sandy Williams met with an FBI agent and an FBI informant, Melvin Weinberg, both posing as representatives of one of the sheiks. Feinberg stated that Senator Williams was interested in the mining project and was anxious to have it funded. He also made it clear that the Senator had an undisclosed interest in the venture, which he said was half of Feinberg's share. As Errichetti described the relationship to the sheik's representatives, Feinberg was the Senator's "bagman." Sandy Williams said that $13 million was needed to get the mining venture into operation. In early March, Sandy Williams suggested to the sheik's representatives that Abdul Enterprises loan an additional $70 million to finance the purchase of a titanium dioxide plant owned by the American Cyanamid Company. He estimated the total financing needs were $100 million.

On March 21, 1979, Sandy Williams discussed with the Senator a meeting the Senator was scheduled to have with the sheik two days later on board a yacht in Florida. Sandy Williams testified that he told the Senator, "Pete [the Senator's nickname], this is an important meeting," to which the Senator replied, "Sandy, look, I will do everything possible to get that money." At a party aboard the yacht on March 23, the Senator met the sheik and told one of the sheik's representatives that he was interested in having the mine funded and would "assist [the representative] in any way possible in getting this project going."

The next day Errichetti reported to the sheiks' representatives how impressed the Senator had been and that he "can be of service to you in Washington or wherever. This is Government stuff, now."

The opportunity for such service appears to have initially come to the attention of Sandy Williams and George Katz, another friend of the Senator's and also a participant in the mining venture, as a result of newspaper articles in late May outlining the need for titanium for national defense, especially its use in submarines. Katz telephoned Weinberg, read him one of the articles, and estimated that the venture could market forty thousand tons a year "[i]f you go into a titanium metal which the United States is short of." In discussing the articles with Sandy Williams, Katz raised the prospect of the Senator's helping to secure government contracts for titanium. Sandy Williams testified that Katz told him, "Sandy, this deal, if it was going to be made, the senator is going to have to exert himself, is going to have to try to get the government contracts for this project." Sandy Williams responded that the Senator could not get government contracts for the project because, as he understood it, contracts in excess of $25,000 were awarded strictly on the basis of competitive bidding. Sandy Williams further testified that later that same day Katz told him competitive bidding was not required:

> He said, you are all wrong about bidding on a government contract. You can negotiate, he said, a contract with the government, if it is a scarce item, if it is an item the government needs, you don't have to bid on it.
>
> And I didn't argue with him because George was in the garbage business in New Jersey and he was

> dealing in government contracts and I took what he said to be true.

On May 30, Weinberg asked Feinberg in a recorded conversation whether the Senator can "do something on getting us the contracts." Feinberg replied, "We can try." The next day the sheik's representatives held a luncheon meeting with the Senator at the Pierre Hotel in New York City. Just before the luncheon, Feinberg told Weinberg in a recorded conversation,

> On the contracts, I can tell you now that he will open up the doors for us. And use his, you know what I'm talking about, to get the contracts.

Moments later Feinberg met with Weinberg and F.B.I. agent Anthony Amoroso, one of the principal undercover operatives. Their recorded conversation included the following:

> Amoroso: Is [the Senator] going to be able to steer any kind of contracts from the Committees that he's on toward, toward the operation that we're going to get involved with? I mean [—]
>
> Feinberg: Well this I didn't know until now I have to ask him that.
>
> Amoroso: Yeah.
>
> Feinberg: I would assume, I know that he's often opened up many doors. You understand what I'm talking about, and with his blessing [—]

Also prior to the luncheon, the Senator met with Feinberg and Sandy Williams. At this meeting, according to the

testimony of Sandy Williams, Feinberg told the Senator, "Pete, the important thing [a]bout this meeting is going to be your help in getting government contracts," and the Senator replied, "I understand."

At the luncheon meeting, when, the Government contends, the subject of getting government contracts arose, the Senator stated, "I can't say yes or no, sure try." The audio tape of this meeting is inaudible as to the conversation preceding the Senator's remark, but other evidence abundantly permitted the jury to conclude that the Senator was referring to his role in obtaining government contracts. First, the conversations just prior to the luncheon indicate that the Senator understood his role. Second, Amoroso, who attended the luncheon, testified that the Senator's willingness to "try" was expressed in response to a statement that the Senator's aid in obtaining government contracts was one of the reasons for the loan. Third, after the meeting, both Feinberg and Sandy Williams reminded the sheik's representatives that the Senator had said he would try to get government contracts.[4]

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[4] A taped telephone conversation on June 8 included this exchange between Feinberg and Weinberg:

Weinberg: All Yassir [the sheik] wants to know is that he's gonna get contracts.

Feinberg: Well he can't gu—he's gonna help us, he's already said that.

. . . .

You heard him say it, didn't you?

. . . .

Weinberg: Yeah, I heard him say it.

Both Feinberg and Weinberg had attended the May 31 luncheon. At a June 15 meeting, also recorded, this exchange occurred:

Feinberg: I talked to the Senator before in New York. I said these people and everybody understands that you have to help us get these contracts. He said of course I will. Isn't that right?

Sandy Williams: Definitely, I was right there.

With the Senator and his cohort having expressed an eagerness to receive from Abdul Enterprises loans totaling nearly $100 million, the Senator met with the sheik on June 28 to persuade him that the Senator's influence justified making the loans. The videotaped conversation reveals Williams discussing at length his ability to be influential with the Government as a result of his senior position in the Senate. In addition to mentioning his close relationship with the Vice-President ("used to work for me, on the committee") and the Secretary of State ("a neighbor back in New Jersey. . . we're very close"), the Senator assured the sheik:

> I only involve myself in something that I, I just completely believe in and this one, this whole situation we've presented through the mine, the processing and the product. I believe it, you know. With . . . great pleasure talk to the President of the United States about it and, you know, in a personal way and get him as enthusiastic and excited because we know what our country needs.

Government contracts were explicitly mentioned:

> Williams: We've got thirty thousand tons we could produce a year. Therefore, with what we got of this value, knowing the need of our country, being here in a position to go to ah well, you know, right to the top on this one.
>
> . . . .
>
> And we've got a combination here, we're a couple of Senators and . . . when we work together, Senator Errichetti and I, it works.
>
> . . . .

Amoroso: [The sheik] feels that with you behind this thing, with the people that you know, the ah government contracts, available, you know, this whole thing—

Williams: Right through.

. . . .

Amoroso: . . . [T]his is why I wanted you to meet with the sheik and he wanted to meet with you because I think without you . . . he would've felt it was just another business deal.

Errichetti: Well, without the Senator, there is no—forget it. There's no, no mines or nothing. In fact, the Senator, Pete had the opportunity wherewithall and the know-how in his position as the United States Senator. . . .

Williams: Yes, I, I've been here decades and, uh, in that position you come up to those positions and you work with the people that make the decisions.

. . . .

Amoroso: Well, then, there—in that respect, then, with you being in that position and contracts and, uh, the like would not be a problem.

Williams: No problem. No. In a situation where we can just sit around and describe, they'll see, it will come to pass.

. . . .

Amoroso: Well, that, like we discussed, ah that end of it is really, uh, not our concern, it's none of our business, who you go to—

Williams: Yeah.

Amoroso: —you know, to do—

Williams: But you can be assured that we, we—

Amoroso: —the manipulation behind the behind the scenes.

Williams: —we have a relationship that will make all of that possible. That's that's all I want to tell you now.

The conversation also revealed the Senator's reason for being helpful and the means for receiving his financial reward:

Williams: I'm not gonna be in this situation forever and I want to have a you know foundations which give me that independence when I, later time.

Amoroso: Alright. Well, then we're agreed on the—I just wanted, uh, for you to tell us who you wanted to have it in—

Williams: Alex.

Amoroso: —so that we're gonna put your shares in Alex's name—

Williams: Alex.

Amoroso: —and he will control them and I think ah he's gonna actually sign them and then, if you want, you can maintain possession of them.

Errichetti: [Inaudible] as he sees fit.

Williams: That's the way to do it. Yeah.

On August 5, at a meeting at a restaurant at John F. Kennedy Airport, the Senator accepted stock certificates representing an 18% share in three corporations Feinberg had formed to carry out the mining venture. As previously agreed, the certificates had been issued to Feinberg, who then endorsed them in blank. In the recorded conversation of the meeting, Williams acknowledged his understanding of the arrangement:

Amoroso: [T]hese are the certificates and I had Alex endorse them . . . .

. . . .

Williams: And he just endorsed these over then.

Amoroso: Yeah.

Williams: In blank.

Weinberg: Right.

Williams: Very good.

Weinberg: So they're blank you can leave them blank and when you want to put your name in it you can put your name in it.

The Purchase Transaction

At the August 5 meeting, the sheik's representatives broached the possibility that a second group of Arabs might be willing to pay millions of dollars for an outright purchase of the mining venture. On August 27 Katz and Sandy Williams met with the Senator to compare this second opportunity to the first approach of obtaining only loans. According to Sandy Williams' testimony, Katz

told the Senator that, as part of the sale, he would have to "stay . . . with the same kind of arrangement . . . and he [help?] get government contracts [for the new owners]." The Senator replied, "We'll go the second way." Sandy Williams also testified that on September 4, Feinberg told the Senator that the "same things that he promised Yassir . . . he would do for the second group," and the Senator said that he would.

The principals in the mining venture met with the Senator on September 11 to decide whether to sell their interests to the second group of Arabs for a sum estimated by Sandy Williams to produce a profit for the group of $70 million. The meeting was videotaped. Under the proposal Sandy Williams was to be employed by the new group to run the venture, and he would be the person to contact the Senator. The Senator's role was spelled out by Weinberg:

> The whole thing on this sale depends [on] you and the government getting the contracts for us cause the whole thing depends upon it. You're the one that's gotta give us the O.K. to do it. If you have any qualms about it, you wanna keep it the same, it makes no difference to me either way. But the whole thing depends upon you to work the same capacity as you working for us to get us government contracts. Ya do it for them. No, in no way would your name be mentioned there or any shares in your name. And if they have to reach you it'll be through strictly, through Sandy.

In the ensuing discussion, the Senator acknowledged, as he had previously told Feinberg and Sandy Williams, that the assistance already promised to the Arab lenders would continue for the Arab purchasers:

> [P]ut it this way to them, that this group to give them, whatever they feel there's some assurance this entity will continue with 'em.
>
> . . . .
>
> And be helpful to them.
>
> . . . .
>
> We got this all together on certain premises and they will, they will continue.

At one point the Senator suggested that a more appropriate selling price might be $100 million. Ultimately Feinberg made a motion that the principals agree to sell the venture, and the other four participants—Senator Williams, Sandy Williams, Katz, and Errichetti—all voted "Aye."

On October 7, at a meeting at the Plaza Hotel in New York City, which was recorded, the Senator and Feinberg explained to the sheik's representatives how Williams' profits from the sale would be concealed, at least for the present. The issue arose when Amoroso told the Senator that Katz had understood from the September 11 meeting that "all of a sudden you were going to announce to the world . . . [t]hat you . . . got 15 million dollars." Williams replied, "Oh Christ no." The exact arrangement was unclear, but the essential point was made by Feinberg in these words: "I know how to get him money now without him declaring it." Some form of a blind trust was to be used, which Feinberg assured the Senator would conceal his interest until he retired. "Then you can say I've got it." The Senator expressed his understanding that while some contemporaneous record would be made, no disclosure would occur until years later:

> There are ways and ways to . . . be on a, on a certain record. Now, if it[']s a blind trust er, uhh that's the way for my purposes, I, I will find a way to . . . make that kind and nobody knows nothing.
>
> . . . .
>
> And then way down the road someone said, well, you know he had all of his interests and nobody knew anything. Well, there we have it under the trust. You see. So I've done what I had to do.

Defenses

In the face of this overwhelming evidence of the Senator's seeking funds for the financing and purchase of a mining venture in which he had an interest in exchange for his assistance in obtaining government contracts for the venture, Williams and Feinberg attempted a defense based on the alternative propositions that either no crimes had been committed, or, if any had been committed, they were the product of government entrapment. *See United States v. Valencia*, 645 F.2d 1158, 1170-72 (2d Cir. 1980) (amended 1981) (outlining limited opportunity for alternative defenses of non-involvement and entrapment).[5]

5 On this appeal, the Government disputes that a defendant who takes the stand and denies commission of a crime may also assert the inconsistent defense that he was entrapped into committing the crime. The point is more pertinent to Senator Williams, who denied committing certain of the acts alleged, than to Feinberg, who denied that the acts committed were criminal in nature. In *United States v. Valencia*, *supra*, 645 F.2d at 1170-72, we noted the division among the circuits as to whether a defendant may both deny commission of a crime and claim entrapment. We ruled narrowly that a defendant could claim non-participation and also entrapment if "he did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *Id.* at 1172. That ruling permitted a defendant, who did not testify, to argue to a jury that the prosecution had failed to meet its burden of proving either commission of the crime or the defendant's predisposi-

The entrapment contention was put to the jury primarily through the argument of counsel. In their testimony the defendants endeavored to deny the commission of any crimes. Feinberg's approach was to claim that it was legitimate for a Senator to agree to use his influence to help obtain government contracts, despite the Senator's having a financial interest in the venture and seeking loans, necessary for the venture's viability, and the sale of the venture in exchange for his assistance. In Feinberg's view, there was nothing wrong with the arrangement because the Senator was only going to be "opening up the doors" and because he and the Senator intended ultimately to disclose the Senator's interest.

The Senator's equally brazen denial of wrongdoing proceeded on two levels. First, he denied that he had agreed to do anything with respect to government contracts. Though the Senator primarily asserted that he had made no promise to *obtain* contracts, he also insisted, in the face of his recorded statements to the contrary, that he had not agreed even to *try* to secure contracts. He told the jury, "I just knew I was not going to say anything about contracts." Second, the Senator contended that whatever he had done was only to benefit his friends, Feinberg and Sandy Williams: "I knew how hard they were working on this mine, my friends, and I wanted to help them." Despite the recorded conversations in which he received his shares of stock and discussed the concealment of his

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tion. We did not, however, go further and consider whether a defendant who testifies that he did not commit the crime could also claim, in the alternative, that, if he did, his actions were the product of government entrapment. Because the Government did not object to an entrapment charge in this case and because we find no reversible error in connection with the District Court's handling of the defense of entrapment, we leave open the issue whether inconsistent defenses may be asserted in circumstances beyond those that occurred in *Valencia*.

interest, he told the jury, "I was not interested . . . in receiving any stock."

III.

On appeal, the defendants raise primarily three issues relating to or supplementing their defense of entrapment. First, they contend that the evidence established entrapment as a matter of law, by which they mean that the evidence was insufficient to permit a jury reasonably to find beyond a reasonable doubt that the defendants were predisposed to commit the crimes charged. Second, they contend that the trial judge erred in his charge concerning entrapment. Third, they contend that the totality of the Government's actions in orchestrating the crimes charged constituted outrageous conduct beyond an outer limit of fairness established by the Due Process Clause.

A. Entrapment as a Matter of Law

Appellants contend, and the Government has never disputed, that there was sufficient evidence of inducement of the defendants by the undercover agents to place upon the prosecution the burden of proving beyond a reasonable doubt that the defendants were predisposed to commit the crimes charged. *See Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). What the parties dispute is whether there was sufficient evidence to permit the jury reasonably to conclude beyond a reasonable doubt that the defendants were predisposed, *i.e.*, "ready and willing without persuasion" to commit offenses of the sort charged and "awaiting any propitious opportunity," *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (L. Hand, J.). Appellants allege that the government agents initiated all aspects of

the crimes, that the Senator and his cohort initially rejected the idea of any criminal conduct, and that government agents improperly persisted in persuading the Senator to commit crimes that they were not ready and willing to commit. We conclude that the evidence permitted the jury to reach quite different conclusions, although the evidence of governmental persuasion is substantial.

Government Initiation

As we have noted, the initial involvement of Senator Williams with the Abscam "sting" operation originated with the Senator, not with the Government. Alerted by Errichetti to the availability of money to be invested by wealthy Arabs, the Senator instructed Feinberg to pursue the matter. Moreover, it was an associate of the Senator's, Sandy Williams, who specified the amount of money, $100 million, that the Senator's group hoped to interest Abdul Enterprises in lending. The first indications that Senator Williams would be of assistance to the venture also originated with the Senator. He had assured Sandy Williams as early as 1975 that he would give the mining venture all the help he possibly could. When the prospect of possible financing from Abdul Enterprises arose in early 1979, the Senator repeated to Sandy Williams his willingness to help the venture and so informed one of the sheik's representatives at the yacht party on March 23, 1979. The first suggestion that the Senator's help might involve use of his official position was Errichetti's statement the next day, March 24, that the Senator "can be of service to you in Washington or wherever. This is government stuff, now." Only after these preliminary indications of the Senator's willingness to be helpful on "government stuff" did the Abscam operatives broach the specific subject of government contracts, first to

Feinberg on May 30 and then to the Senator at the Pierre Hotel on May 31.[6]

Defendants' Reluctance

The record flatly refutes the claim of reluctance on the part of the defendants. Feinberg's response to the first offer of a criminal opportunity on May 30 was, "We can try." On May 31 the Senator assured Feinberg and Sandy Williams that he understood the importance of his help in getting government contracts, and his first response to a government agent's offer of a criminal opportunity was his statement to the sheik's representatives at the luncheon meeting that day that he would "sure try" to get contracts. The Senator repeated his willingness to seek government contracts for the mining venture in conversations with Sandy Williams on June 16 and June 24. On June 19, at a meeting in his Washington office with Errichetti and Feinberg, the Senator expressed no reluctance to Errichetti's urging that he impress the sheik how willing he was to help obtain government contracts. As Feinberg reported to Weinberg in a recorded conversation the night of the Washington meeting, "It's all beautiful. He's very agreeable. No problem." The extent of the Senator's willingness to "try" was made abundantly clear in the Senator's June 28 conversation with the sheik when he offered to use his influence with various government officials including the President. In fact, the record is barren of expressions by the Senator of any hesitation whatever in agreeing to use his influence to try to obtain

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6 On April 23, 1979, Weinberg asked Sandy Williams whether the Senator could "get us the bids" on government contracts for chemicals. At trial, neither the Senator nor Feinberg made any claim that Sandy Williams ever mentioned this inquiry to them.

Government contracts in order to secure financing for the mining venture.

Appellants take unwarranted comfort in one remark attributed to the Senator by Errichetti and in statements of Sandy Williams, Feinberg, and Katz. Errichetti, in a recorded conversation on June 27, related the June 19 conversation in the Senator's Washington office in which he had told the Senator how important it was to be persuasive when the Senator met the sheik on June 28. Errichetti claims he said to the Senator, "You're gonna fucking guarantee that fucking contract. He said 'no way.' " If the jury credited this remark, which significantly was not mentioned by Senator Williams in his trial testimony, they were entitled to conclude that the Senator was demurring only to making a claim that he would "guarantee" a government contract; his willingness to use his influence to *try* to obtain contracts remained undiminished.

What Williams' brief calls a "negative response" by Sandy Williams and Feinberg is their momentary uncertainty as to whether the Senator would try to obtain government contracts. Sandy Williams said on April 23, "Well, I don't know about that." Feinberg said on May 31, just before the Pierre Hotel luncheon, "Well, this I didn't know until now I have to ask him that." However, Feinberg's very next sentence was, "I would assume, I know that he's often opened up many doors. You understand what I'm talking about, and with his blessing [—]."

No more helpful to defendants is Katz' comment to Weinberg in a recorded conversation on June 10, that the Senator "doesn't use that power for any advantages." The context makes clear that Katz was referring to the Senator's reluctance to use power for leadership within the Senate. As Katz explained, "He's not the kind of a

guy like Long or Kennedy, where they've got the power and they use it." When Weinberg then said, "Well he said he would get us the contracts you know," Katz replied, "Oh there's no question if he's got an interest, he'll do something like that, naturally."

Even more unhelpful to appellants' cause are the occasions on which, according to appellants, the Senator refused opportunities to receive unlawful payments, separate from the millions of dollars he agreed to accept for the financing and purchase of the mining venture. These episodes, in fact, provided the jury with additional evidence of a damning nature. The first episode concerns Weinberg's July 9, 1979, offer to Sandy Williams to pay the Senator $20,000 in cash as "expense money." Sandy Williams testified that he relayed the offer to the Senator on July 18. The Senator asked, "Sandy, do I have to be handed the money?" to which Sandy Williams answered, "Pete, I don't want you to be handed the money." The Senator then suggested that Sandy Williams "go and get the 20,000" and agreed to split the money with him. The next day the Senator suggested that Sandy Williams send part of the cash to the Senator's son who needed funds to purchase a car. When the undercover agents learned of the Senator's unwillingness to accept the cash personally, they decided not to make the payment.

The second episode occurred on January 15, 1980, when the Senator met with the sheik for the last time. The conversation was recorded. The sheik offered to pay the Senator cash in return for the Senator's assisting him to immigrate and obtain permanent residence. The Senator refused, explaining "when I work in that area, that kind of activity, it is purely . . . public." But, despite having been offered a bribe, the Senator stated his willingness to help the sheik with his immigration problem because this

would help the mining venture succeed. The Senator referred to his help as "a desirable thing to do for you, personally" and "part of creating something of value, bringing in that ore."

Government Persuasion

Once Senator Williams expressed a willingness to agree to use his influence to try to obtain government contracts, Weinberg, acting for the Government, endeavored to make sure that when the Senator met with the sheik, he would spell out his willingness clearly and emphatically for the benefit of the sheik and the television camera. To achieve this objective, Weinberg enlisted Errichetti and Feinberg and then took on the assignment directly. On June 7, Weinberg told Errichetti, in a recorded conversation, "Let Tony [Agent Amoroso] and you speak to Senator . . . all we want to hear from him is that he's going to get us some government contracts." On June 15, in a recorded conversation, Weinberg told a group of the Senator's associates, including Errichetti and Feinberg, "The Senator's gotta be told alright? In no [un]certain terms that he's gotta move his fucking ass to get the goddamn government contracts."

The messengers warmed to their task. In a recorded conversation on June 27 Errichetti gave a group of the Senator's associates this account of a June 19 session he had had with the Senator in his Senate office:

> When I went there, he didn't say two fucking words. I got Pete by the fucking throat, I tell you about as close as I came in this office. Let me tell you something . . . don't you go fucking this thing up. I got a chance to make a fucking million dollars . . . . All you're gonna do is give a fucking speech like you

> never gave in your life . . . . You're gonna fucking guarantee that fucking contract. He said "no way."
>
> . . . .
>
> He said, "no way." I said you're gonna fucking say it. . . . Never mind about doing it. You're gonna fucking say it."

At the same June 27 session, Feinberg reported, "I also told Pete that he after that won't ever have to open his mouth." In anticipation of the next day's meeting with the sheik, Feinberg telephoned the Senator from the meeting and told him, "Eric [Errichetti] will talk to you before you go in and just like he said it[']s a bullshit speech."

On June 28, in a recorded conversation ten minutes before the Senator's meeting with the sheik, Weinberg personally carried the message to the Senator in these words:

> Forget the mine. Don't even mention the mine. All you have to do is tell him, alright.
>
> . . . .
>
> How high you are in the Senate. He's interested in you.
>
> . . . .
>
> Without, without you there is no deal. You are the deal. You put this together. You worked on this and you can get, you got the government contracts. Without me there is no government contracts.
>
> . . . .
>
> [A]nd you tell him in no [un]certain terms without me there is no deal. I'm the man. I'm the man who's

gonna open the doors, I'm the man who's gonna do this to use my influence and I guarantee this. Follow me?

. . . .

All bullshit.

. . . .

And that's it, it goes no further, it[']s all talk, all bullshit. That's all he wants to hear.

. . . .

It's a walk-through. You should be out of there in twenty minutes.

. . . .

You're on stage for twenty minutes.

. . . .

So you ready to go on-stage?

As we recounted in *Myers II*, *supra*, 692 F.2d at 839-40, this "coaching" by Weinberg, especially the June 28 episode, dismayed at least some Government prosecutors and precipitated a meeting of prosecutors and F.B.I. agents on August 9, 1979, at which Weinberg was cautioned about such tactics.

Basis for a Finding of Predisposition

Notwithstanding the evidence of persuasion, the jury was fully entitled to find, from the totality of the evidence, that the defendants were "ready and willing" to commit the crimes charged as soon as the opportunity was first presented—to Feinberg on May 30 and to Senator Williams on May 31—and at all times thereafter. At no time did either defendant hesitate or express any

reluctance. Even if the jury believed that the Senator told Errichetti on June 19 that he could not "guarantee" government contracts, he continually expressed to the agents, and to his associates in private conversations, his willingness to use his influence to try to obtain the contracts for a venture in which he had a concealed interest. And the evidence fully entitled the jury to conclude that the defendants understood that the Senator's agreement to help to obtain contracts was a condition for obtaining the loan and later the prospect of a sale. The jury was also entitled to consider his prompt willingness to accept half of the $20,000 in "expense" money that Weinberg discussed with Sandy Williams. And the jury could also consider his agreement to assist the sheik on an immigration problem as "part of creating something of value, bringing in that ore."

The "coaching" carried out by Weinberg on June 28 and earlier through Errichetti and Feinberg was a factor to be considered by the jury in assessing predisposition, but these tactics do not detract from the sufficiency of the evidence of the Senator's predisposition because the jury was entitled to conclude, as the Senator himself testified, that he paid little attention to what Errichetti and Weinberg told him and decided for himself what he would say at the crucial June 28 meeting with the sheik.[7] Indeed, the

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7 On direct examination, when asked about Weinberg's "coaching" session with him on the morning of June 28, the Senator testified:

> I think I said yesterday, this is not for me, what he's talking about, that kind of effort to impress the Sheik. I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.

On cross-examination, this exchange occurred:

> Q. And didn't Errichetti tell you on June 19th that the only thing the sheik was interested in is your telling him that you would get government contracts?

salient feature of the entrapment defenses asserted in this case is that both defendants testified and neither one even claimed that the persuasion of the government agents had prompted them to commit the crimes charged.[8] That omission may have been the inevitable consequence of their trial strategy of simultaneously denying criminal conduct and claiming entrapment. Whatever their motive, the defendants, by their testimony, made it relatively easy for the prosecution to sustain its burden of proof on predisposition.

On the entire record, Judge Pratt was correct in ruling that the prosecution presented sufficient evidence of the defendants' predisposition to permit the jury to reject their defense of entrapment.

B. Challenge to the Entrapment Instructions

Appellants contend that the entrapment instructions were erroneous in two respects. They first claim that Judge Pratt removed the issue of entrapment from the jury's consideration. The basis for this claim is the following portion of the charge:

> You are not to be concerned with whether the prosecution or the F.B.I. agents or Mr. Weinberg acted legally or illegally, properly or improperly or

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A. If he said that, it didn't register with me because my mind was not accepting government contracts as any part of this thing.

Earlier, when asked on direct examination whether he had been "put off" by what Errichetti and Weinberg had urged him to say, he answered:

It was offensive but it didn'[t] mean a great deal to me to tell you the truth.

[8] Feinberg claimed in his trial testimony that he had been "under a lot of pressure by Mr. Weinberg," but he also insisted, "We had done nothing at all illegitimate."

whether the Abscam investigation itself was conducted properly. Those are questions which must be decided by me at an appropriate time.

The challenged sentences were not error. It was not any part of the jury's function to decide whether the Abscam tactics were illegal or improper. Their function, as Judge Pratt told them, was to decide whether they were satisfied beyond a reasonable doubt that each defendant was predisposed to commit the crimes charged. And with respect to that question Judge Pratt instructed as follows:

> In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator Sandy Williams, George Katz, and Angelo Errichetti.

In the same vein, the sentence immediately preceding the passage complained of by the appellants instructed the jury as follows:

> What the F.B.I. agents and Mr. Weinberg did should concern you only to the extent that you find that it affected the conduct and state of mind of a defendant or other participants in the conspiracy or only insofar as it may affect the credibility of any witness with respect to the matters before you.

The charge, taken as a whole, fully and fairly permitted the jury to consider the Abscam tactics as they related to the defense of entrapment.

The second claim arises from Judge Pratt's response to a question asked by the jury during deliberations. The jury's note read as follows:

> Would you kindly explain the legal guidelines of a scam operation?
>
> At what point do the practices or methods used in a scam become entrapment in regards to the law?
>
> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

This note precipitated an extended colloquy between Judge Pratt and counsel for both defendants. Attorney Koelzer, representing Williams, began by noting that part of the inquiry had misstated the burden of proof with respect to entrapment. Whereas the note had asked, "Does entrapment have to be established from day one of the indictment," Koelzer correctly pointed out that, once inducement is shown, the Government has to prove predisposition. Taking the jury's phrase, he maintained that predisposition had to be proved " 'from day one.' In other words, from on or about the first day of January, 1979, these two men were predisposed beyond a reasonable doubt—." Judge Pratt promptly interjected, "That is an overstatement." Attorney Batchelder, representing Feinberg, pointed out that the question related to entrapment, not predisposition, and that entrapment can occur anytime during the scheme. Disputing Attorney Koelzer, he added, "So when he says that you have to have entrapment from square one, the answer is no, no, no, no." He then suggested that the entrapment portion of

the original charge be reread in full. Judge Pratt then ascertained that both counsel agreed to that suggestion.

When the jury was recalled, Judge Pratt began by making sure the jury understood that, since inducement was not disputed, the defendants had no burden to establish anything with respect to entrapment, that the burden was upon the Government to disprove the defense by showing that the defendants were predisposed to commit the crimes. At that point, he made the statements that appellants now contend created reversible error:

> You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.

This was followed by a rereading of the entrapment portion of the original charge. At the conclusion of the supplemental charge, Judge Pratt asked if there were exceptions and counsel took none, other than to preserve their prior objections to the original charge.

As a general proposition of law the fragment of the supplemental response now challenged by appellants was erroneous. A defendant's predisposition is not to be assessed "as of that time when he committed the crime." Normally, predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime. By "state of mind" we do not mean to require specific prior contemplation of criminal conduct. It is sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion. The phrase "ready and willing"

adequately captures that concept and does so in a manner likely to be comprehensible to juries.

In the circumstances of this case, however, the erroneous statement in the supplemental charge does not warrant reversal for several reasons. First, neither counsel, after hearing the statement, objected to it or asked for a clarifying instruction. Second, neither counsel had suggested to Judge Pratt a correct statement of the law that would have answered the jury's questions. Attorney Koelzer's initial suggestion that predisposition had to be proved from "day one . . . on or about the first day of January, 1979" was, as Judge Pratt noted, an overstatement. The earliest that predisposition had to be established was as of the time when the agents first presented the criminal opportunity to the defendants, which was May 30 with Feinberg and May 31 with the Senator. There was no reason to focus the jury's attention on the Senator's state of mind at the start of the indictment period, which was five months before any criminal opportunity was broached by the undercover agents.[9]

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9 The standard charge on entrapment requires the prosecution to prove that the defendant was ready and willing to commit the crimes charged "before anything at all occurred respecting the alleged offense." 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 13.09, at 364 (3d ed. 1977). In many cases, including this one, undercover government agents discuss non-criminal matters with a target before presenting a criminal opportunity. Such preliminary contact is normally not conduct "respecting the alleged offense." Since the entrapment defense exonerates a defendant who has been induced to commit a crime he would not otherwise have committed, the inducement must consist of efforts to persuade him to commit the crime, and those efforts will normally not occur until the criminal proposition has been broached. Simply cultivating the friendship of a target preparatory to presenting a criminal opportunity is not inducement to commit a crime.

We do not rule out the possibility, however, that cases may arise in which the agents in their preliminary contacts with a target indirectly suggest that a crime might occur, even though they do not explicitly invite the target to commit one. In the pending case, the first contact

Third, the isolated remark complained of was followed by a rereading of the full charge on entrapment,[10] which correctly set forth the applicable principles, *see United States v. Parisi*, 674 F.2d 126, 128 (1st Cir. 1982), and, following *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971), focused the jury's attention on the three possible bases of proving predisposition—a design to commit the offense formed prior to any inducement, a prompt and unhesitating agreement to the corrupt proposal, or an existing course of similar conduct. Fourth, and most important, on the facts of this case, the statement as to time of predisposition was not prejudicial because the criminal opportunity was accepted when it was first presented. The time when the crime was first committed virtually coincided with the pertinent time for assessing predisposition. Thereafter the Senator simply repeated and emphasized his willingness to commit

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by the Abscam operatives with the defendants that involved any discussions "respecting the alleged offense" was the presentation of a criminal opportunity on May 30.

10 The charge included the following language:

> Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered.
>
> To sustain its burden of proof the government has to satisfy you that its agents have not induced an innocent person, but that the inducement which brought about the offenses charged simply brought about another instance of the kind of conduct which the defendant was prepared to engage in, if offered an opportunity which appeared favorable. Thus, if the prosecution has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged whenever a favorable opportunity was offered to commit them, then you may find the government did no more than furnish a convenient opening for the criminal opportunity in which the defendants were prepared to engage.

the crimes. On the facts of this case, the supplemental charge, taken as a whole, contained no prejudicial error.

C. Claim of a Due Process Violation

Appellants contend that the methods used by the government agents in developing the cases against them exceed an outer limit of fairness mandated by the Due Process Clause. This argument is to be distinguished from the basic defense of entrapment. That defense, as recognized in the federal courts, focuses on the state of mind of the defendant and precludes conviction only when government agents by their inducements prevail upon a person who was not predisposed to commit the type of crime charged. Though it has been insistently urged that the entrapment defense should focus exclusively on the conduct of the agents and preclude a conviction whenever their conduct could be expected to induce an average person to commit the crime, *see, e.g., Sherman v. United States, supra,* 356 U.S. at 378-85 (Frankfurter, J., concurring); *Sorrells v. United States, supra,* 287 U.S. at 453-59 (Roberts, J., concurring), a majority of the Supreme Court has never accepted this objective test. However, in recent years, the minority of those on the Supreme Court favoring an objective test has been somewhat encouraged by the suggestion, subscribed to by five members of the Court in *Hampton v. United States,* 425 U.S. 484, 491-95 (1976) (Powell, J., concurring, joined by Blackmun, J.); *id.* at 495-500 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.), that extreme cases may arise where the government conduct was so outrageous as to violate due process, even though the evidence permitted the jury to find that the defendant was predisposed. Since the Supreme Court has never applied the Due Process Clause to invalidate a conviction based on "outrageous" govern-

mental inducement, we do not know what sort of circumstances the Court believes would meet this elusive standard. In assessing whether the circumstances of a given case present such extreme facts, care must be taken, as the Third Circuit has observed in an Abscam case, "not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense." *United States v. Jannotti*, 673 F.2d 578, 608 (3d Cir.) (en banc), *cert. denied*, 102 S. Ct. 2906 (1982).

We have previously declined to hold that the Abscam operation violated the Due Process Clause, *Myers II*, *supra*, 692 F.2d at 836-47; *United States v. Alexandro*, 675 F.2d 34, 39-42 (2d Cir.), *cert. denied*, 103 S. Ct. 78 (1982), and we see no basis for concluding that the activities of the government operatives directed against the defendants in this case exceeded the constitutional limits of fairness. Appellants point most insistently to the "coaching" activities of Weinberg, which we have recounted. It is understandable that agents who have heard a suspect make incriminating statements or been told by others that he has made them will be anxious to provide an opportunity for the suspect to repeat these statements under circumstances where they can be surreptitiously, though lawfully,[11] recorded. Appellants maintain, however, that Weinberg went further and endeavored to put words in the Senator's mouth.[12] However these

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11 Appellants' claim that the recordings violated their Fourth Amendment rights is entirely without merit. In every instance, recordings were made by a participant to the conversations in whom the other speakers had simply misplaced their confidence. *United States v. White*, 401 U.S. 745, 752-53 (1971); 18 U.S.C. § 2511(2)(c) (1976).

12 There was evidence at the due process hearing, denied by Weinberg, that at the August 9, 1979, meeting at which Weinberg was reprimanded, he told the agents that he had "to put words in people's

"coaching" tactics might square with our personal notions of appropriate law enforcement conduct, our judicial task is to measure these tactics against the as yet undefined standard of "outrageous" conduct that the Supreme Court has suggested might offend constitutional limits. That standard was not exceeded in this case. There is lacking in this record any indication that the "coaching" was persistently directed at an unwilling subject in an unconscionable effort to erode his law-abiding instincts. The most that Weinberg did was to spell out for the Senator how to commit the crimes, but his "coaching" involved neither pressure nor persistent exploitation of personal weakness, as might occur if an agent preys upon an addict's need for narcotics. *See Sherman v. United States, supra.* Moreover, it would be hard to imagine that government conduct could ever be deemed so outrageously unfair to a defendant as to warrant dismissal of charges when the defendant asserts that he scarcely paid any attention to what was said to him.

One aspect of this case that distinguishes it from prior Abscam convictions is the size of the inducements offered to the defendants. The proposed loan of $100 million and the proposed profits of $70 million from the sale unquestionably involve sums of money far in excess of the amounts normally tendered by government agents in an attempt to catch an "unwary criminal," *Sherman v. United States, supra*, 356 U.S. at 373. However, as Judge Pratt pointed out, 527 F. Supp. at 1101, the loan was to be repaid with interest. Therefore, its value to the defendants was not the amount of the loan, but rather the

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mouths or we won't make any cases." The remark was testified to by two FBI agents. *See Myers, II, supra*, 692 F.2d at 839. Whether or not Weinberg made the remark, his conduct glaringly reveals that the alleged remark accurately reflected his intent.

profits they anticipated making as a result of securing financing for their venture. Whatever profits were anticipated were the result of the defendants' estimates; the agents did not offer to assure any particular level of profits in connection with the proposed loan. Moreover, the amount of financing needed for the venture was determined by Sandy Williams and proposed to the agents. Only the purchase proposal involved selection by the Abscam operatives of a dollar figure, and even this figure was related to the figures already proposed by the principals in the mining venture. The combined property that the second group of Arabs was purportedly interested in buying included the American Cyanamid plant, which Sandy Williams had estimated could be purchased for $70 million.

We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator. In this case the claim is wholly without merit. There is no evidence that the Senator's anticipated share of the profits from the loan or the sale exerted an unconscionable pressure upon him. He readily agreed to the loan transaction, and when the purchase was proposed, he calmly discussed with his associates whether the loan or the purchase was more advantageous for them and then, without any hesitation, agreed to the purchase. He even suggested at one point that the sale price should be increased to yield profits of $100 million. When a Senator elects to interest himself in transactions involving large sums of money, he cannot claim that it is unconstitutional for undercover agents to frame their offers of criminal opportunities within the financial context he has already established.

Apart from the clear evidence of Weinberg's "coaching" and the size of the inducements, the appellants' complaints about Abscam are not different from those voiced by defendants in *Myers II*. These include the use of as disreputable a person as Weinberg, the failure to record every conversation with all of the co-conspirators (although no claim is made of an exculpatory remark made to a government agent that was not recorded), the lack of a basis for suspecting Senator Williams before responding to the overtures initiated by Errichetti and Feinberg at the Senator's suggestion, and the failure to ascertain that the Senator would accept a criminal opportunity before the agents met with him. None of the circumstances cited by the appellants, nor their aggregate effect, constitutes the sort of outrageous imposition upon an individual that might exceed a due process test of constitutional fairness. *See Myers II*, *supra*; *United States v. Alexandro*, *supra*; *United States v. Jannotti*, *supra*.

One aspect of the evolution of the criminal conduct evidenced by the record merits additional comment. When the Abscam operatives broached the possibility of criminal conduct to the Congressmen in *Myers II*, the proposal was, from the start, a clear-cut invitation to commit a crime: $50,000 was offered solely in exchange for an agreement to use official influence with respect to an immigration matter. The criminal opportunity presented to Senator Williams differs in one important respect. The financial inducement, the $100 million loan, was initially discussed in connection with what appeared to be an entirely legitimate business transaction. Then, after Errichetti suggested that the Senator "can be of service," the agents broached the prospect of the Senator's unlawfully using his influence for private gain.

We recognized in *Myers II* the possibility that "at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness." 692 F.2d at 843. The subtle shifting of a legitimate proposal into an unlawful one, as occurred in this case, has the potential for presenting a jury with close questions of intent and risking incorrect fact-finding—a risk that could be substantially reduced if agents simply put to a target the kind of straightforward proposal offered to the Congressmen in *Myers II*. Of course, many cases involve the risk that juries will incorrectly assess key facts, especially those, like intent, that cannot be objectively ascertained. It is not the risk of factual error that creates unease; it is the needless creation of that risk by governmental action.

We have reviewed the record with this concern in mind and have reached the conclusion that the clarity of the evidence places this case well short of any point at which we might be apprehensive that the verdicts had been rendered needlessly questionable by governmentally created ambiguities in the presentation of a criminal opportunity to a target. The evidence not only permitted the jury to find the Senator and his accomplice guilty; it reveals them as unmistakably involved in a corrupt agreement to misuse public office for private gain. The ultimate terms of the proposal were put to the Senator with clarity on repeated occasions. His understanding was evidenced by his own recorded statements on June 28 and again on September 11. And his state of mind was fully revealed not only by his statements with respect to the crimes charged but also by his willingness to accept cash if he could receive it indirectly and his willingness to help the mining venture succeed by assisting on an immigra-

tion matter for which he had been offered (and had refused) a cash bribe. On this record we find no unconstitutional conduct that taints the validity of a judgment of conviction.

IV.

Appellants make three claims concerning the construction of the statutes under which they were indicted. First, they contend that Counts Four and Eight failed to state an offense under the conflict-of-interest statute, 18 U.S.C. § 203(a), because the prospective government contracts for the purchase of titanium were not identified with sufficient particularity. The statute punishes receipt of compensation for services to be rendered in relation to any "proceeding, application, . . . contract, claim, . . . or other particular matter" in which the United States has a substantial interest.[13] We accept the appellants' argument, based on the structure of the statute, that the phrase "other particular matter" has the effect of causing the adjective "particular" to modify all of the preceding nouns, including "contract." However, we disagree that the force of the adjective is so strong as to require pleading or proof of a single contract identified by contract number or similar individualized detail. It is sufficient if the compensation has been received for services to be rendered with respect to a particular category of contracts. The description of government contracts for the purchase of titanium sufficiently particularizes the services to be rendered in this case to state an offense. The fact that the statute applies to future proceedings not yet pending, *United States v. Evans*, 572

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13 The scope and background of section 203(a) are reviewed at length in *Myers II*, *supra*, 692 F.2d at 853-58.

F.2d 455, 481 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Johnson*, 215 F. Supp. 300, 316 (D. Md. 1963), *aff'd*, 337 F.2d 180, 196 (4th Cir. 1964), *aff'd on other grounds*, 383 U.S. 169 (1966), indicates that it applies to a particular category of matters, and need not be narrowed to just one identified contract, which might not be known until a proceeding involving the contract was actually pending.[14]

Second, the appellants contend that Count One, the conspiracy charge, failed to state an offense under 18 U.S.C. § 371 because it alleged that an objective of the conspiracy was to deprive the United States of the "honest and faithful services of a United States Senator." Their point is that a United States Senator, having been elected by the citizens of his or her state, owes honest and faithful service only to them and not to the United States. The argument is without merit. The numerous statutes enacted to punish criminal behavior by Members of Congress demonstrate the assertion of a significant interest on the part of the national government in the honest performance of duties by those elected to the national legislature. There can be no serious doubt as to the constitutionality of these statutes.

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14 Unlike Congressman Murphy, whose conviction for violating the conflict-of-interest statute was reversed, *see Myers II*, *supra*, 692 F.2d at 853-58, Senator Williams made no claim that his efforts with respect to matters before government agencies would be limited to giving advice, as distinguished from acting in a representative capacity to secure favorable treatment. Though the charge as to the conflict-of-interest violation in the pending case broadly (and erroneously, *id.*) stated that the services covered by section 203(a) include giving advice, the broad charge was not objected to at trial, the evidence showed only an agreement to try to influence government officials to award contracts, and no claim concerning the scope of services covered by section 203(a) is raised on appeal. On this record, the error with respect to the section 203(a) charge is harmless and has been waived.

Third, appellants contend that the phrase "anything of value," receipt of which is proscribed by the statutes punishing bribery, 18 U.S.C. § 201(c), and unlawful gratuity, 18 U.S.C. § 201(g), means something that objectively has actual value. Their point in this regard is that the stock received by the Senator had no commercial value, and that Judge Pratt erred when he told the jury that stock could be a thing of value "if, regardless of its actual worth in the commercial world, you find that the defendant believed that the stock had value for himself." We think Judge Pratt correctly construed the statutes to focus on the value that the defendants subjectively attached to the items received. The phrase "anything of value" in bribery and related statutes has consistently been given a broad meaning, *e.g.*, *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), to carry out the congressional purpose of punishing misuse of public office. Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe. When the Senator received shares of stock in the three corporations organized to hold the properties of the mining venture, he expected these shares to have considerable value, representing not only the potential value of the properties but also the benefit of the contemplated loan of $100 million.

V.

Only two of the appellants' remaining contentions merit any discussion. First, appellants contend that the District Court erred in admitting evidence of two transactions in which Senator Williams used his influence in an effort to advance the financial interests of himself and his

wife. One effort concerned the application of the Ritz-Carlton Casino to obtain a casino license from the New Jersey Casino Control Commission and to secure exemption from Commission guidelines requiring new construction. The Hardwicke Companies, part of the consortium backing the Ritz-Carlton, employed the Senator's wife as a consultant and later paid a $50,000 fee to defendant Feinberg. The Senator himself expected to receive $1 million as his share of a finder's fee to be paid in connection with financing for the Ritz-Carlton, which was to be supplied by Abdul Enterprises. Just prior to the Commission's vote on the Ritz-Carlton application in May 1979, the Senator, without any urging by the Abscam operatives, called the Commission chairman. In a recorded conversation on October 7, 1979, the Senator acknowledged making the call; his efforts and similar efforts by Feinberg were asserted by Feinberg, in the same conversation, to have "changed" the Commission's "mind" and saved $30 million. The other effort concerned the Senator's contacts during the 1970's with various New Jersey officials on behalf of Biocel of New Jersey, a corporation formed by Sandy Williams to franchise garbage recycling technology. Sandy Williams had given half of his interest in Biocel to Senator Williams, the Senator had brought Feinberg into the project, and the Senator and Feinberg had subsequently decided to give a 13% interest in a subsidiary of Biocel to the Senator's wife.

Conduct " 'morally indistinguishable' " from the offenses charged is probative on the issue of predisposition, *United States v. Viviano*, *supra*, 437 F.2d at 299 n.3 (quoting *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933)), and admissible subject to the usual weighing of probative force against unfair prejudice as mandated

by Fed. R. Evid. 403. Since counsel for appellants argued strenuously to the jury that any criminal conduct occurring in connection with the Senator's agreement to try to obtain government contracts for the titanium mining venture was the product of governmental inducement, it was appropriate to present evidence of the Senator's use of his influence on behalf of himself and his wife in circumstances where no government agent asked him to do so. Even if, as appellants contend, the Senator's conduct in the Ritz-Carlton and Biocel matters did not violate New Jersey law, it was probative of his willingness to agree to take similar action to obtain titanium contracts from the federal government, conduct that violates federal law. Judge Pratt's admission of the Ritz-Carlton and Biocel evidence was well within his discretion.

The remaining contention is that Count One of the indictment was duplicitous in alleging a conspiracy both to defraud the United States and to commit various substantive offenses. "The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' " *Braverman v. United States*, 317 U.S. 49, 54 (1942) (quoting *Frohwerk v. United States*, 249 U.S. 204, 210 (1919)). This principle has been specifically applied to a single count charging conspiracy to defraud the United States and to commit substantive offenses. *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). The specificity of the conspiracy-to-defraud allegations and the jury's verdicts on the substantive counts eliminate any possibility of the concerns expressed in *United States v. Rosenblatt*, 554 F.2d 36, 40-42 (2d Cir. 1977), on which appellants rely, that a count alleging only a conspiracy to defraud the United States in some unspecified way risks

conviction without either an allegation or proof of the essential nature of the fraud.

VI.

We have considered appellants' other claims and are satisfied that they are without merit and do not warrant discussion. For all of the reasons set forth in this opinion and for the further reasons set forth in the comprehensive opinion of Judge Pratt, denying the defendants' post-trial motions, we conclude that both appellants were fairly tried and that there is no legal infirmity in their convictions. The judgments appealed from are affirmed.

APPENDIX B

Opinion of the District Court on Due Process Issues
529 F. Supp. 1085 (E.D. N.Y. 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CR 80-00575

UNITED STATES OF AMERICA

v.

HARRISON A. WILLIAMS, JR. and
ALEXANDER FEINBERG,
Defendants.

Dec. 22, 1981

GEORGE C. PRATT, District Judge.

TABLE OF CONTENTS

Page No.

I. PRIOR PROCEEDINGS ..... [47a]
II. EVIDENCE AT TRIAL ..... [50a]
III. THE JURY'S VERDICTS ..... [53a]
IV. DEFENDANTS' ARGUMENTS ..... [56a]
V. MOTION TO SUPPRESS TAPES ..... [57a]
VI. INSUFFICIENCY OF EVIDENCE TO SUPPORT FEINBERG'S CONVICTION ON COUNT 5 ..... [58a]
VII. CLAIMED ENTRAPMENT ..... [59a]
VIII. CLAIMED OUTRAGEOUSNESS ..... [65a]
A. The "Coaching" Incident ..... [66a]
B. Timing of Interruptions ..... [70a]
C. Internal Governmental Memorandum ..... [72a]
D. Selective Prosecution ..... [73a]
E. Amount of Inducement ..... [75a]
F. Miscellaneous Instances of "Outrageous" Conduct ..... [76a]
G. Cumulative Effect ..... [76a]
IX. CLAIMED MISCONDUCT BY GOVERNMENT AT TRIAL ..... [77a]
A. Ritz Casino Evidence ..... [78a]
B. Biocel Evidence ..... [79a]
C. The Purpose for the Resale "Stall" ..... [80a]
D. Feinberg as "Bag Man" ..... [83a]
E. Summations ..... [85a]
X. CONCLUSION ..... [86a]

POST-TRIAL MEMORANDUM AND ORDER

Having been found by the jury to have been predisposed to commit the crimes of bribery, unlawful gratuity, conflict of interest, interstate travel, and conspiracy, defendants Williams and Feinberg now urge the court to set aside the jury's verdicts and dismiss the indictment for due process and related reasons. After considering the arguments advanced and weighing all the evidence adduced in this and related cases, the court concludes that with one exception, the motions to dismiss, for judgment of acquittal, and for a new trial must all be denied. The one exception concerns defendant Feinberg's motion for judgment of acquittal on count 5, discussed in section VI, *infra*.

I. PRIOR PROCEEDINGS

U.S. v. Williams, et al., CR 80-00575, was the fourth Abscam case tried before this court. In contrast to the three previous cases, which were transferred from Judge Mishler in August, 1980, this case was directly assigned to the undersigned as a "related" case when the indictment was filed on October 30, 1980. The case was originally set down for trial in February, 1981, but was later adjourned at defendants' request.

Extensive pretrial motions were filed, argued, and ruled upon. Defendants' motions to have the case reassigned, to dismiss the indictment on speech and debate grounds, to hold a pretrial due process hearing, for a severance, to inspect portions of the grand jury transcripts, for dismissal of the indictment due to pretrial publicity, for a pretrial hearing on the admissibility of co-conspirator hearsay statements, for dismissal due to delay in presenting the case to the grand jury, for dismissal of portions of the indictment on grounds of duplicity and multiplicity, to disqualify Thomas Puccio from prosecuting the case, to suppress all tape recordings involving Melvin Weinberg, to inspect all of the records

of the jury clerk, for disclosure of income tax information relating to defendant Williams gathered by the government, and other requests were all denied. Numerous other motions seeking discovery, production of documents, a bill of particulars, and copies of videotapes, audio tapes, and transcripts were granted in part.

Motions for severance by defendants Katz and Errichetti were granted. Decision on defendant Williams' motion to dismiss on grounds of selective prosecution was reserved, and the motion was consolidated with defendants' due process claims, decision on which was deferred until after the jury trial.[1] At least five pretrial appeals were taken to the Second Circuit, but this court's denial of the motion to dismiss on speech and debate grounds was affirmed, and the other appeals were dismissed as untimely. All motions to stay the trial were denied either by this court or the Court of Appeals.

Trial commenced on March 30, 1981, and continued until May 1, when the jury returned its verdicts of guilty on all counts against both defendants. A post-trial "due process" hearing was held on June 22 through June 25, 1981, for which additional discovery materials were sought and provided. The court approved a post-hearing briefing schedule that was protracted in order not to interfere unduly with defendant Williams' efforts to meet

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[1] Defendant Williams made an additional pretrial motion seeking disclosure of any prior electronic surveillance in order to assess whether the government had determined to prosecute Williams because of any information obtained through surveillance activities. The government requested that the results of an "all agency search" be furnished to the court, and the court inspected the documents furnished in response to the search. The court did not disclose the contents of the documents to defense counsel, but assured them that no materials relevant to the instant case had been produced. Defense counsel at one point continued to request access to the materials furnished to the court, which request was denied. The materials were placed under seal and are available for appellate review.

charges pending in the United States Senate; that schedule was later extended further at defendants' request. On October 21, 1981 the court heard oral argument by all sides.

In addition to the records of the trial and post-trial hearings, the parties have had available to them for use on this "due process motion" the trial transcripts from the *Myers*,[2] *Lederer*,[3] and *Thompson*[4] cases, as well as the transcript from the consolidated post-trial hearing[5] held in those cases. Moreover, the court advised counsel that it would consider all of the arguments made by defendants in those three related Abscam cases, as well as any evidence from the Philadelphia and Washington Abscam cases[6] that might be brought to the attention of the court through counsel.

The specific post-hearing papers submitted on the instant motions include Williams' memorandum and reply memorandum in support of the motion to dismiss on due process and related grounds; Williams' brief and reply brief in support of motions for judgment of acquittal or a new trial; Feinberg's memorandum in support of all post-trial motions; the government's post-hearing memorandum in opposition to all motions; letters from Williams' attorneys of record dated October 23, 1981 and November 14, 1981; and a letter from Feinberg's attorney dated November 14, 1981. In addition, defendant Williams relies on two briefs filed pretrial relating to his

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[2] *U.S. v. Myers et al.*, 527 F.Supp. 1206 (E.D.N.Y. 1980).

[3] *U.S. v. Lederer et al.*, 527 F.Supp. 1206 (E.D.N.Y. 1980).

[4] *U.S. v. Thompson et al.*, 527 F.Supp. 1206 (E.D.N.Y. 1980).

[5] Consolidated memorandum and order denying "due process" and other post-trial motions (July 24, 1981).

[6] *U.S. v. Jannotti et al.*, 501 F.Supp. 1182 (E.D.Pa. 1980); *U.S. v. Jenrette et al.*, Docket No. CR 80-00289 (D.D.C. 1980); *U.S. v. Kelly et al.*, Docket No. CR 80-00340 (D.D.C. 1980).

claim of selective prosecution and suppression of tape recordings involving Weinberg.

II. EVIDENCE AT TRIAL

The general background of the "Abscam" investigation has previously been described by this court in its opinion denying the consolidated "due process" motions (hereinafter referred to as *Myers* decision), and need not be repeated.[7] Memorandum and order of July 24, 1981. In each of the three prior cases the trial focused upon a videotaped meeting at which a congressman was offered and accepted a cash bribe. In contrast, the charges in *Williams* covered a greater time span, and involved transactions that were more complex and subtle, than the earlier cases.

Williams involved four defendants: (1) Harrison A. Williams, Jr., who is the only United States Senator to be indicted as a result of the Abscam investigation; (2) Alexander Feinberg, who was Williams' attorney, and was claimed by the government to be his "bag man"; (3) George Katz, a New Jersey businessman who was alleged to have been a co-conspirator and participant in the business deal out of which the *Williams* charges arose; and (4) Angelo J. Errichetti, who was Mayor of Camden, New Jersey, and a New Jersey state senator.

Errichetti's trial was severed under a stipulation calling for dismissal in the event his conviction in the *Myers* case is affirmed. Katz' trial was severed based on a doctor's certification that he was too ill to stand trial.[8] Consequently, only Williams and Feinberg were tried by the jury.

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[7] In the *Myers* decision this court set forth its views on many of the issues presented by defendants in this case. Not only is familiarity with that decision assumed, but the rulings therein, insofar as relevant here, are incorporated by reference into this memorandum and order.

[8] The court has been informed that Mr. Katz is now deceased.

The charges focused upon a business transaction relating to a titanium mine in Virginia and processing plant in Georgia. Senator Williams' investment group, consisting of himself, Feinberg, Katz, Errichetti and Sandy Williams,[9] sought financing to acquire the titanium enterprise. Through Errichetti the group contacted undercover agent Anthony Amoroso and Melvin Weinberg, who posed as members of Abdul Enterprises, an investment firm pretending to represent wealthy Arab sheiks.

Attorney Feinberg organized three corporations to acquire ownership in and to operate the mining and processing venture, and the government's evidence permitted the jury to find that Williams and Feinberg each held an 18% stock interest in each corporation. Gov't ex. 19A. When the stock certificates were issued, blank certificates intended for defendant Williams' benefit were delivered to him by Amoroso in a recorded meeting at Kennedy airport on August 5, 1979. Gov't ex. 21A.

Criminality arose out of the promise requested by the undercover agent as a condition for the financing, which was that defendant Williams would promise to use his power and influence as a United States Senator to obtain government contracts for purchasing the titanium to be produced by the mine and processing plant. The government contended that defendant Williams agreed to do so in connection with two separate transactions: the stock-and-loan transaction, and the sale-of-stock transaction.

In the stock-and-loan transaction, the government's proof tended to establish that defendants organized corporations for the purchase and operation of the titanium mine and processing plant; that defendants each received an 18% stock interest in the corporations, with that of defendant Williams being hidden; that an agreement was reached between defendants and the goverment's

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[9] Sandy Williams was a long-time friend of defendant Williams, but was not related to him.

undercover operatives whereby $100 million in financing would be provided by the Arab sheik; and that defendant Williams agreed to use his position as a United States Senator to obtain government contracts for the titanium.

In the sale-of-stock transaction the government's evidence tended to show that even before the original loan transaction could be closed, a new group of Arab businessmen were willing to buy out the entire operation provided that Williams would retain a small interest and would, again agree to use his influence as a United States Senator to obtain government contracts to purchase titanium.

Williams met with the sheik and his representatives on seven different occasions. At the final meeting, January 15, 1980, the sheik offered Williams money in return for the senator's assistance in permitting him to immigrate to the United States. Williams indicated that he was willing to assist the sheik, but he refused the money, explaining that his primary interest was in the mining venture.

For each of the two transactions the government charged four specific crimes against the defendants: bribery (18 U.S.C. § 201(c)), criminal gratuity (18 U.S.C. § 201(g)), conflict of interest (18 U.S.C. § 203), and interstate travel for unlawful activity (18 U.S.C. § 1952). In addition, the defendants were charged with conspiracy (18 U.S.C. § 371) to defraud the United States and to commit the substantive offenses of bribery, criminal gratuity and conflict of interest. As the relevant public official, defendant Williams was charged with direct violations of the bribery, gratuity, conflict of interest, and interstate travel statutes. Defendant Feinberg was charged under 18 U.S.C. § 2 with aiding and abetting Williams' commission of those offenses.

The defendants presented evidence to show, and they argued to the jury that the titanium venture was a legit-

imate business transaction, that defendant Williams never agreed to use his influence to obtain government contracts, that neither defendant intended to violate any statute, that there was no conspiracy either to defraud the United States or to violate any of its laws, and that the defendants were the victims of entrapment.

In addition to the audio tapes, the videotapes, and the testimony of the government agents, the government presented the testimony of Sandy Williams, who testified for the government under a grant of immunity, and a number of other witnesses. Defendants sharply attacked the credibility of Sandy Williams and of the government agents, and urged the jury not to draw from their testimony the inferences suggested by the government.

Both defendant Williams and defendant Feinberg testified and offered explanations of their conduct as it had been recorded on the tapes. Through counsel and, in part, by their own testimnoy, Williams and Feinberg argued that they had been entraped into committing whatever crimes had been committed.

III. THE JURY'S VERDICTS

The ultimate choice of inferences depended to a large degree upon the jury's resolution of the credibility questions. From the verdicts it is apparent that the jury believed neither defendant Williams nor defendant Feinberg, and that is basically accepted the testimony of Sandy Williams as well as the government's interpretation of the tapes. Viewed in that light, the guilty verdicts on all but one count are amply supported by the evidence. Under the court's instructions, with the one exception discussed in section VI, *infra*, the jury's verdicts of guilty against all defendants on all counts established the essential elements of the crimes charged.

On the bribery count that was based on the stock-and-loan transaction, 18 U.S.C. § 201(c), the jury found

that defendant Williams received and agreed to receive stock in the titanium mine venture plus the promise of a loan from the sheik to finance the venture; that he received the stock and loan promise in return for being influenced in his performance of an official act, namely, to use his influence as a United States Senator with officials in the executive branch of the United States government and with other United States senators to obtain government contracts for the titanium mine; that when he sought the loan and received the stock defendant Williams intended to use the influence of his position to get government contracts; that defendant Williams acted knowingly, willfully, and corruptly; and that he was not the victim of entrapment because he was predisposed to commit the crime of bribery.

Three key issues were highlighted for the jury: (1) What was Williams' intent in accepting the stock and seeking the loan? (2) Did he act corruptly? and (3) Was he predisposed to commit the crime? On each of these issues the jury rejected Williams' own testimony and, based on the circumstantial evidence before them, determined that each of the elements had been established beyond a reasonable doubt.

On the criminal gratuity count, 18 U.S.C. § 201(g), the jury was asked to analyze the same facts from the point of view of the criminal gratuity statute. Many of the essential elements of criminal gratuity duplicated those of bribery. The significant difference was that the jury found that defendant Williams received, or agreed to receive, the stock for or because of an official act to be performed by him.

On the conflict of interest charge, 18 U.S.C. § 203(a), the jury found that the loan and stock was compensation that Williams received or agreed to receive in return for services to be rendered by him in relation to obtaining contracts from the government for the purchase of ti-

tanium. The jury, of course, also found that in doing so he acted knowingly and willfully, and was not the victim of entrapment.

On the interstate travel count, 18 U.S.C. § 1952, the jury found that on August 5, 1979 defendant Williams travelled from New Jersey to the Northwest Airlines terminal at John F. Kennedy International Airport in New York State; that he did so with the intent to carry on or promote the unlawful activity of receiving a bribe; that while he was at JFK airport he accepted delivery of the stock certificates; that he acted knowingly and willfully; and that he was not the victim of entrapment.

With respect to the sale-of-stock transaction which is the subject of counts 6 through 9, the jury's findings were necessarily similar to those on counts 2 through 5 pertaining to the stock-and-loan transaction, except that the "thing of value" and "compensation" received by Williams was the promise of a second group of Arab businessmen to purchase the venture outright, and the corrupt conduct of defendant Williams consisted of a repetition to the new group of the same promise, *i.e.*, that he would use his influence to obtain government contracts for the titanium. The interstate travel occurred on September 11, 1979 when defendants Williams and Feinberg and others travelled to Kennedy Airport to meet with Amoroso, Weinberg and others to discuss the sale of the stock.

In the substantive counts, 2 through 4 and 6 through 8, defendant Feinberg is charged as an aider and abettor, and the jury's verdicts determined not only that defendant Williams was guilty of the underlying crimes, but also that defendant Feinberg willfully joined in and assisted defendant Williams in committing each of those crimes. The jury also determined that defendant Feinberg was not the victim of entrapment on any of the substantive counts.

Feinberg was also charged as an aider and abettor in count 5; here, the evidence before the jury does not support a guilty verdict. *See* section VI, *infra*. In count 9 Feinberg in charged directly with a Travel Act violation for his travel to Kennedy Airport on September 11, and the evidence supports the jury's verdict of guilty on this count.

On the conspiracy count, 18 U.S.C. § 371, the jury necessarily found that there was a conspiracy of the type charged in the indictment, that both of the defendants willfully became members of the conspiracy, that specified overt acts were committed during their membership in the conspiracy, and that defendants were not the victims of entrapment.

IV. DEFENDANT'S ARGUMENTS

On these motions defendants incorporated all of the arguments urged in the *Myers*, *Lederer* and *Thompson* cases, and advance additional specific arguments in support of their own unique due process contentions. Defendant Williams argues that he was entrapped by the government agents, who through extraordinary lures and pressures induced him to commit the offenses charged; that evidence of his predisposition is lacking as a matter of law; that as a matter of statutory construction Congress did not intend for these defendants' actions to constitute a crime; that considered as a whole the government's conduct was so outrageous as to require dismissal of the indictment; that the court's charge effectively prevented the jury from considering the entrapment issue; that the audio tapes and videotapes forming the background for the government's case were erroneously admitted into evidence; and that defendant Williams was the victim of selective prosecution by the government. Williams has also filed a separate brief in support of motions for judgment of acquittal or a new trial wherein he asserts that prosecutorial misconduct

and erroneous introduction of similar act evidence warrant the relief requested.

Defendant Feinberg's main argument is that as a matter of law on the evidence adduced at trial the government failed to prove Feinberg's predisposition to commit a crime. Feinberg's contention, which was vigorously pressed at trial to both the court and the jury, is that the government's inducements were so overwhelming that it is impossible for the government to prove beyond a reasonable doubt Feinberg's predisposition. Feinberg also urges that the similar act evidence concerning the Ritz casino transaction was erroneously admitted at trial and was so prejudicial as to deprive him of a fair trial. Finally, Feinberg contends that the trial record lacks any evidence to support his conviction of the Travel Act's violation charged in count 5.

V. MOTION TO SUPPRESS TAPES

Defendants urge that all of the tapes of the voices of defendant Williams and defendent Feinberg should have been excluded from evidence because under the circumstances here they constituted an unreasonable search and seizure. The government's first response is that defendants have not preserved their fourth amendment claims by filing an appropriate pretrial motion. The government is correct to the extent that defendant Williams' pretrial motion to suppress all tape recordings involving Weinberg relied on the court's general supervisory powers rather than on any claimed fourth amendment violation. F.R.Cr.P. 12(b)(3) requires that any motion to suppress evidence be made before trial; F.R.Cr.P. 12(f) provides that the failure to make such a motion constitutes waiver.

Recognizing the limitations on the timeliness of suppression motions imposed by Rule 12, defendant Williams contends that cause has been shown for relief from the waiver, F.R.Cr.P. 12(f), and that because he is making

a novel fourth amendment claim the normal rule should not apply. Along these same lines defendant Williams asserts that the magnitude of the surreptitious taping directly affects defendants' due process rights, an area expressly reserved for post-trial resolution.

To the extent Williams' argument is based on fourth amendment grounds, the court agrees with the government that the failure to file a pretrial motion constitutes a waiver. To the extent Williams' current motion relies on "due process" considerations, it is lacking in merit.

While he grudgingly acknowledges that consensual recordings have, as a matter of precedent, escaped the exclusionary rule, *U.S. v. White*, 401 U.S. 745 (1970), the new counsel for defendant Williams argues that when so many tapes are used, the cumulative effect becomes unreasonable and, therefore, unconstitutional.

A cynic might characterize defendants' argument as urging that while a little "truth" is permissible, large quantities of "truth" are unconstitutional. For present purposes, however, it is sufficient to comment that there is no authority for the novel contention advanced by new counsel for defendant Williams, and this court concludes that the argument is as wanting in logic as it is unsound in principle. As pointed out in the *Myers* decision, the quality of evidence produced by tape recordings, particularly by the videotapes in the Abscam cases, far exceeds the sketchy, imperfect evidence availabe in the usual trial based upon witnesses' unaided recollections. The motion to suppress the tapes on the ground that there were too many of them is, therefore, denied.

VI. INSUFFICIENCY OF EVIDENCE TO SUPPORT FEINBERG'S CONVICTION ON COUNT 5

Defendant Feinberg contends that the record is "completely barren" of any evidence to support his conviction for aiding and abetting defendant Williams' travel

to JFK International Airport on August 5, 1979, where Williams met with Amoroso and Weinberg and accepted shares of stock from them. Gov't ex. 21A. Feinberg argues that the record shows that only Errichetti and Sandy Williams were involved in arranging the meeting at the airport between defendant Williams and the government agents.

In support of the verdict the government points only to defendant Williams' testimony concerning conversations he had with defendant Feinberg about transfer of the shares of stock. After reviewing the evidence in the case and particularly the portions of the transcript relied upon by the government, the court concludes that the evidence supporting Feinberg's knowledge of defendant Williams' travel in interstate commerce to further the illegal transaction is ambiguous at best. While the record does indicate that discussions about transferring the stock took place between Williams and Feinberg, there is no evidence that Feinberg had any hand in arranging either the meeting at Kennedy Airport that eventually occurred or the interstate travel that led to the meeting. Tr. at 4641-42.

Defendant Feinberg's motion on count 5 for judgment of acquittal pursuant to F.R.Cr.P. 29(c) is therefore granted.

VII. CLAIMED ENTRAPMENT

Defendant Williams advances several arguments relating to the entrapment defense. To the extent that it asserts that the government agents' conduct toward defendant Williams was improper, the argument goes to the issue of "outrageousness" which is discussed in section VIII of this decision. To the extent that these arguments focus upon the philosophical nature of entrapment and its general relationship to the problems of governmental misconduct, they were reviewed and decided in the

Myers decision. No new arguments in this area are advanced by defendant Williams, and his rehash of the general issue has not persuaded this court to change its view of the present state of the law relating to "objective entrapment" as expressed in *Myers*.

Two arguments are advanced, however, that deal with specific entrapment issues in this case. Defendant Williams argues, first, that the court's instructions to the jury on the issue of entrapment were erroneous, and second, that the evidence was insufficient for the jury to find he was predisposed to commit the crimes charged.

The first argument, relating to the jury instructions, contends that the court took the issue of predisposition away from the jury. This argument seizes upon one sentence in an unrelated section of the charge, presents it out of context, and concludes that the predisposition question was withdrawn from the jury.

Such a strained construction of the charge not only ignores the overall structure of the charge, but also ignores the specific issues that were given to the jury in the form of the essential elements of the crime. On each count of the indictment the jury was instructed that in order to find the defendant guilty they would have to determine that the government has established beyond a reasonable doubt that the defendant was not the victim of entrapment. As explained to the jury, entrapment is made up of two parts, inducement by government agents to commit the offense, and no predisposition by the defendant.

The jury was further instructed that "the term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act." Tr. at 5572. The court next pointed out some of the inducements presented by the government to defendants and turned the jury's

attention specifically to the question of predisposition. Specifically, the court stated:

> Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered. Tr. at 5574.

The court then reviewed several of the conceptual and evidentiary problems that the jury would have to consider in determining whether or not a defendant was predisposed. That review covers approximately 5½ pages in the record. Tr. 5574-5579.

Later, after completing its discussion of the essential elements of the nine counts of the indictment and after a review of certain specific evidence problems, the court turned to a general wind-up intended to place matters in an overall perspective. The first three paragraphs of that discussion read:

> It is important, ladies and gentlemen, that you focus on the precise issues before you. As I said at the beginning, the defendants are on trial in this case for the specific counts of this indictment. One count of conspiracy, two counts each of bribery, criminal gratuity, conflict of interest and interstate travel for wrongful purposes.
>
> What the FBI agents and Mr. Weinberg did should concern you only to the extent that you find that it affected the conduct and state of mind of a defendant or other participants in the conspiracy or only insofar as it may affect the credibility of any witness with respect to the matters before you.
>
> *You are not to be concerned with whether the prosecution of the FBI agents or Mr. Weinberg acted*

> *legally or illegally, properly or improperly or whether the Abscam investigation itself was conducted properly. Those are questions which must be decided by me at an appropriate time,* but except in assessing credibility here, not questions which should affect your determination of the facts in this case or the guilt or innocence of these defendants, your central focus must be upon what the defendants did and what they thought.

Defendant Williams contends that the underscored portion of the above passage in effect took the predisposition question away from the jury and emasculated his predisposition defense. Both in its immediate context and in the overall context of this lengthy charge, it appears to this court to be unrealistic for defendant to suggest that the jury could in any way have inferred from the underscored language a direction either that they were not to consider defendants' predisposition or that they were to automatically conclude that the entrapment element of each offense had been negated beyond a reasonable doubt. Defendant Williams' motion on this ground is therefore denied.

The second question on predisposition raised by defendant Williams is whether there was sufficient evidence from which a jury could reasonably find predisposition. In substance, defendant Williams argues that the record establishes that he was not predisposed to criminal conduct of any sort, and that it is unquestionably true that when his name came up in the Abscam investigation the government had no reason to suspect him of criminal conduct.

However, at the very beginning when Errichetti approached Weinberg about a possible loan for a business venture in which defendant Williams was interested, considerable doubt was cast upon Williams' position. As early as March, 1979 there had been presented to the Abscam investigators, at defendant Williams' initiative,

a proposed business venture whose principals included a businessman with a known criminal background (Katz), a grossly corrupt local politician (Errichetti), a lawyer (Feinberg) who was advertised by one of his own co-venturers as a "bag man" and who showed he was willing, if not anxious, to pay and receive bribes, provided they were called "fees". All three of them were enthusiastically pushing a titanium mine in which a United States Senator (Williams) had a hidden interest.

In its brief the government reviews in some detail the extensive evidence at trial from which the jury could properly find predisposition. While the court does not agree with the government's characterization of that evidence as "overwhelming", it does view the evidence as sufficient to support the jury's findings beyond a reasonable doubt that both defendants were predisposed.

Considering that evidence in the light most favorable to the government, and resolving credibility issues in favor of the government and against the defendant, as required by the applicable precedents, *e.g.*, *Glasser v. U.S.*, 315 U.S. 60, 80 (1942), the jury could have found that for an extended period of time defendants Williams and Feinberg had used Williams' influence and position in attempts to enrich themselves; that, specifically, this was done in connection with the Biocel and Ritz projects; that Feinberg was Williams' "bag man";[10] that on May 31, 1979 when first asked if he would seek government contracts for titanium, Williams said that he would "try"; that later, at least twice, he specifically agreed to use his influence to obtain government contracts for the titanium; that Williams was willing to receive cash in "expense money" as long as it did not pass to him directly; and that together Williams and Feinberg sought to conceal

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[10] *See* discussion in section IX-D.

Williams' involvement in the titanium mine by use of a "blind trust".

Defendant Williams also urges that the "pre" in "predisposition" requires as a matter of law that a defendant's inclination to commit a crime must exist before he has any contact with government agents. This argument can be viewed on two levels. As part of the "outrageousness" argument, it urges that before any investigation may begin, the government must have evidence that its eventual target was predisposed to commit a crime. This argument is discussed in the "outrageousness" section.[11]

On a different level, defendants' argument could be viewed as requiring that the jury, when it determines "predisposition", focus not upon the time when the crime was commited, but upon the time when the government's investigation began. On a conceptual level, the court rejects this argument. The relevant time for determining predisposition cannot be so precisely focused. Evidence of everything that happened before final completion of the crime was relevant, but ultimately, it was for the jury to determine under the instructions given here whether the defendants were predisposed, that is, whether they were otherwise innocent persons who were enticed, induced, persuaded, or lured to commit the crime, or whether they were ready and willing to commit such a crime whenever a favorable opportunity was offered. The jury found that the agents did not induce an innocent person, but did no more than furnish a convenient opening for criminal activity in which defendant Williams and defendant Feinberg were prepared to engage.

Defendant Williams comments that in the *Myers* decision this court seems to have "written off" the predisposition concept as a matter of law. This argument reflects misunderstanding of the issues in *Myers*. That de-

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[11] *See* discussion in section VIII-D.

cision dealt with seven defendants in three cases. Except for some due process overtones, entrapment was not raised by the four defendants in *Myers* nor by the two defendants in *Murphy*. In those cases there was no request to charge on the issue, and the government did not present evidence on the issue.

Only with Congressman Lederer were entrapment and predisposition made issues for the jury's determination. With Lederer, there was very little evidence of the defendant's earlier activities. The jury was asked to determine predisposition largely from evidence showing Lederer's knowledge of the purpose of the meeting and his response to the bribe when it was offered. The instruction on entrapment given there was similar to the one presented to the jury here; it focused primarily on the predisposition question, and it asked the jury to determine from all the circumstances whether or not Congressman Lederer was predisposed to accept the proffered bribe.

Consequently, while predisposition was not a major concern in the *Myers* due process decision, this court by no means "wrote it off" as a potentially significant legal issue under proper circumstances. Such proper circumstances were certainly present as to defendants Williams and Feinberg here, and on substantial evidence the jury determined the issue against them.

VIII. CLAIMED OUTRAGEOUSNESS

Defendants contend that numerous incidents of governmental misconduct, either singly or in combination, place this case at the "demonstrable level of outrageousness" that the Supreme Court has suggested might warrant dismissal of charges even where proof of a defendant's predisposition to commit a crime defeated his claim of entrapment. *Hampton v. U.S.*, 425 U.S. 484 (1976). The instances of misconduct relied upon are discussed below.

A. *The "Coaching" Incident.*

Much ado is made about the so-called "coaching" episode on June 28, 1979, where Weinberg is said by defendants to have put words in defendant Williams' mouth and thereby prevented him from speaking his own mind at the meeting with the sheik that followed immediately thereafter. In that taped conversation, Weinberg told Williams that the sheik was interested in hearing how "high" Williams was in the Senate, Gov't ex. 14A at 2; whom Williams knew who could do favors for the business venture, *id.*; and how Williams would use his influence and importance to obtain government contracts, *id.* at 3-4. Weinberg also told Williams that his conversation with the sheik would be "all talk, and bullshit", *id.* at 5, that he just had to "play, blow his horn, and mention names", *id.* at 6, and that Williams would merely be "on stage for twenty minutes", *id.* at 7.

The videotape of Williams' meeting with the sheik includes statements by the senator of his importance within the senate and his influence with the president, as well as with numerous other governmental officials. Gov't ex. 15A at 7-8. When asked by Amoroso whether he would be able to secure government contracts if the sheik agreed to finance the mining venture, Williams replied, "no problem, * * * it will come to pass." *Id.* at 9. To the jury the government argued that this tape demonstrated defendant Williams' complete and willing commitment to using his position corruptly to secure government contracts for the titanium venture.

Although Williams now asserts through new counsel that Weinberg and Errichetti had placed upon him extraordinary pressures that induced him to make certain uncharacteristic, if not involuntary, statements and to acquiesce by his silence in statements made by others, Williams' own trial testimony simply does not support his new attorney's argument. At trial Williams' own attorney exhaustively questioned him about the effect of

Weinberg's suggestions and comments. Tr. at 4297-4389. When asked by his attorney on his direct examination to explain his reaction to Weinberg's statements, Williams explained that "it was offensive but it didn't mean a great deal to me to tell you the truth." Tr. at 4299. This statement was a consistent theme of Williams' testimony concerning the "coaching" incident:

> He [Weinberg] wanted me to talk about my importance. That's what he wanted. *And I just thought I would go up there and talk about what I thought was important*, and that's what it was all about basically, this enterprise of mine in Virginia. Tr. at 4306 (emphasis added).
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> Q. Senator, now Weinberg is saying to you clearly, government contracts, using your influence. And all you are saying here is um-hum, gotcha, um-hum, um-hum. What were you thinking when this was going on?
>
> A. What I started to develop a moment ago, while he's going on this way I was thinking of what I was going to develop when I got upstairs. • • • *but there can be no exaggeration, no statement of things I know I could not do, would not do* in no shape was I going to be associated with, even in a baloney sense as they called for, and that was a contract. Tr. at 4307 (emphasis added).
>
> • • • •
>
> Q. Did you ever say you are the man, you are going to open the doors, you are the man who is going to do this, to use my influence, and I guarantee this?
>
> A. No.
>
> Q. Did you ever guarantee anything?
>
> A. Absolutely not. Tr. at 4309.
>
> • • • •

And I knew I was not going to say anything about any of that because it had not—I had not been involved. * * * and *I know I was not going to say anything about it.* Tr. at 4310 (emphasis added).

* * * *

I don't know. I was thinking about going upstairs. *I didn't listen intently to every word that Mel was saying,* I'll tell you.

Q. What about you're onstage for 20 minutes, the most expensive TV star that ever got paid. What did that mean to you, sir?

A. This meeting—it is an important meeting. And that's all that I got out of that. Tr. at 4316 (emphasis added).

* * * *

It-I think I said yesterday, *this is not for me, what he's talking about,* that kind of effort to impress the Sheik. *I was going to do it my way. So, I didn't really concentrate on that which was meaningless to me.* I knew what the purpose of the meeting was to try to impress the Sheik. Tr. at 4328-29 (emphasis added).

Williams also testified that contrary to Weinberg's and Errichetti's instructions, he decided to discuss the mine with the sheik:

He [Errichetti] told me not to talk about the mine. I was going to do that—

Q. Did you do that eventually?

A. I certainly did. Tr. at 4329.

* * * *

Q. Why did you begin by talking about the mine which is exactly opposite what Errichetti and Weinberg told you?

A. The only reason this was all coming about, this meeting, as far as I was concerned, was because of

the mine. That was our reason for being together. Tr. at 4332.

At trial, Williams' position was essentially that the videotape did not incriminate him, but the jury obviously rejected his argument. Now, Williams asserts that the incriminating statements he made on videotape were the product of coaching; but his sworn testimony unequivocally establishes that his statements and action on camera were voluntary and intentional. They cannot be dismissed as merely the product of Weinberg's urgings.

The claim of prejudice from Weinberg's and Errichetti's "coaching" is advanced by Williams' new counsel who appeared in the case to argue the "due process" issues. As already demonstrated, Williams testified at trial that he was not influenced by Weinberg's statements. At the post-trial due process hearing, Williams did not testify and retract his trial position. What we are left with, then, is simply an attorney's argument that lacks foundation in the record.

Moreover, Williams could not reasonably complain that he was duped by Weinberg and Errichetti to the point of innocently acquiescing in the proposed illegal bribery. Several time Errichetti and Weinberg had told him that in order to get the loan from the sheik he would have to tell him he had the political connections and power to produce government contracts for the purchase of titanium. There is no way that Williams could have misunderstood what was proposed: an offer of Williams' "power and influence" to obtain contracts in order to induce the sheik to grant the loan. Williams' fine educational background, his long political experience, the heights to which he had risen in the councils of government, all argue overwhelmingly against any claim that people such as Errichetti and Weinberg could "put words in his mouth" or make him say things that he did not mean or did not want to say. The court finds that the conduct toward Williams of the government agents and

of Weinberg with respect to the June 28, 1979 meetings was not "outrageous".

The court further finds that despite the prompting and "coaching" by Errichetti and Weinberg before his meeting with the sheik on June 28, 1979, defendant Williams acted voluntarily and intentionally in that meeting and was not influenced to say or do anything that he had not previously agreed to say and do; consequently, Williams was not prejudiced by the conduct of Weinberg and Errichetti. Absent demonstrable prejudice to Williams, dismissal of the indictment is unwarranted. *U.S. v. Morrison*, 449 U.S. 361 (1981); *U.S. v. Payner*, 447 U.S. 727 (1980).

B. *Timing of Interruptions.*

Williams contends that the government deliberately interrupted his conversation with the sheik on January 15, 1980 when Williams was about to explain why he did not want money in return for immigration help. The January 15 meeting had been arranged by the agents in order to give the sheik an opportunity to discuss with Williams the sheik's desire to immigrate to the United States. In a scene partially reminiscent of the other Abscam cases, Williams was bluntly offered money in return for his promise to assist the sheik's entrance to the United States. Williams, however, rejected the money offer. Gov't ex. 25A at 8-9. As Williams began to explain the basis for his refusal, Amoroso entered the room and told the sheik that a phone call had arrived for him. Moments later, the phone rang and the sheik excused himself from the room.

Defendants urge that the interruption evidences the government's determination to prosecute Williams at all costs. The government was so determined, the argument goes, that Amoroso was deliberately sent into the room to prevent Williams from explaining on tape his refusal of the money.

There are several reasons why this argument is without merit. In the first place, the interruption was anticipated long before the talk turned to bribery. The videotape clearly shows that even before the sheik and Williams were left to discuss matters alone, Amoroso told the sheik that he would be interrupting the meeting with an anticipated phone call. *Id.* at 2. Secondly, defendant's argument assumes that there was to be an interruption only in the event that Williams declined the bribe offer, but the assumption is unsupported by any evidence.

Moreover, Agents Amoroso and Good testified at trial that the decision to send Amoroso into the room to interrupt the meeting was made before Williams had refused the offer of money. The testimony of Thomas Puccio at the due process hearing corroborates Amoroso's and Good's version, and the court finds their explanation believable. Finally, even if the evidence substantiated defendants' "intentional interruption" hypothesis, there was no prejudice to Williams because Williams was given the opportunity to refuse the money on videotape, and not only did so, but also explained why. *See Payner* and *Morrison*, *supra*.

The significance of the interruptions was vigorously argued to the jury by defense counsel, who contended that Williams' refusal of the cash bribe proved his general innocence and his lack of predisposition. The government argued that the videotape confirms Williams' interest in the mining venture, and his desire to have it succeed.

It is true that the tape clearly shows that Williams rejected an offer of money in return for immigration aid to the sheik. But the tape also shows that the interruption did not disrupt Williams' explanation of his position, for when the conversation and the tape resumed, Williams immediately picked up the same subject and stated in substance that what he wanted from the sheik was not

a cash payment, but the sheik's financing for the titanium project. Williams said:

> No, the er, my interest is with my associates. To, to see this very valuable mining area, er, appropriately developed. It's doing nothing now. There is the, there is the ore, there's the titanium. There is the iron. There is the phosphorus. All of them are needed and yet nothing is happening. So *my only interest is to see this come together.* And the, and the, the elements that I can help with, your, *your personal situation.* Er, I am very, *I find it, er, a desirable thing to do for you, personally. And it's part of creating something of value, bringing in that ore.* Gov't ex. 25A at 9 (emphasis added).

C. *Internal Governmental Memorandum.*

Defendants argue that because an internal FBI memorandum of November 27, 1979 suggested that the case against Williams was then incomplete,[12] and because Williams thereafter refused to accept a cash bribe on January 15, 1980, the government itself has already conceded that Williams did not commit any crime and that the indictment, therefore, should be dismissed. Merely because some government employees were not overly impressed with the strength of the Williams case as of November 27, 1979, does not mean that the government was precluded from testing the sufficiency of its evidence before the grand jury in obtaining an indictment, or from convincing a petit jury of defendants' guilt beyond a reasonable doubt. For the government to be bound by internal

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[12] That memorandum is annexed as exhibit A to brief in support of motions for judgment of acquittal or new trial, and was marked as an exhibit at the consolidated due process hearing in *Myers.* DP 73 (Headquarters file, doc. 233). Since the prosecutors' opinions reported therein were irrelevant to the jury's deliberations, the memorandum was not required to be disclosed to defendant at trial. *See also* discussion in section IX-C.

preliminary evaluations of the strengths and weaknesses of a particular case would discourage prosecutors from ever acknowledging that a particular facet of a case was potentially weak or needed further evidence or might require careful handling at trial. Rather than discouraging careful preindictment evaluation of a case, however, the governing rules should encourage a prosecutor to thoroughly and vigorously evaluate all of the available evidence not only to prevent unnecessary trials but also to ascertain and strengthen potential weak spots which might later permit a guilty suspect to avoid conviction.

The court concludes that the existence of the November 27, 1979 memorandum suggesting that further specific proof be adduced of Williams' criminal propensity before seeking an indictment against him does not preclude the government from proceeding even when the additional evidence is not forthcoming.

D. *Selective Prosecution.*

Defendant Williams moved pretrial for dismissal of the indictment on the ground that he was the victim of selective prosecution. The court reserved decision on the motion in order to consider it post-trial in light of evidence that would develop at trial and in the post-trial "due process" hearing. Wiliams now reasserts the motion, although the basis for the contention has shifted somewhat.

Originally, Williams contended that he and other Abscam defendants had been singled out for prosecution because they had supported Edward Kennedy for the Democratic nomination for president rather than the then incumbent, Jimmy Carter. Now, by letter to the court dated October 23, 1981, Williams' attorneys state that the claim is

> not so much that Kennedy supporters were targeted but rather that certain people were given the honesty

test and others, who may have been targeted by lower level government agents, were not so tested either as a result of orders from superiors or tipoffs to them as to the scam. It appears that to a large degree those people were supporters of then President Carter.

Williams contends that he is now entitled to still a further hearing on the issue. Evidence has already been presented on this question, both in the original motion papers, which included some of the testimony of Brewer before the Senate Judiciary Committee, and by witnesses at the due process hearings. On the basis of that evidence the court finds that Williams was not singled out for prosecution, nor was he "negatively selected" through the failure of some justice department official to tip him off that he was under investigation. If such a leak occurred with respect to some other potential targets, as intimated by Brewer's testimony, that leak did not reflect justice department policy, but instead was the result of misconduct by some individual in the department.

The court further finds that there were no orders from superiors directing the investigators to focus upon particular individuals, nor were there any orders forbidding them from pursuing any leads that the investigation opened up. The court further concludes that Williams was not the victim of selective prosecution; on the contrary, his prosecution was the natural outgrowth of his initial joining with Errichetti to seek financing for the titanium mine from the undercover operatives.

Defendant Williams has brought no additional information to the court's attention which would warrant still more hearings under the principles described in *U.S. v. Berrios*, 501 F.2d 1207 (CA2 1974), nor is there any claim of evidence that was newly discovered since the due process hearing in June, 1981. Consequently, defendant Williams' motion for a further hearing on this question is denied.

E. *Amount of Inducement.*

Both defendants, but Feinberg in particular, urge that the amount of the inducement offered to defendants was so great as to constitute entrapment as a matter of law and "outrageousness". In the stock-and-loan transaction the inducement was not an outright payment to the Williams group, but instead was a loan that was sufficient to fund the purchase and initial operation of the titanium mine and processing plant. Interest was required to be at the prime rate, and the loan was expected to be repaid. If the inducement was excessive to the defendants, it could have been only because they realized that the financial potential of the mine and plant did not justify such a loan. Since no personal guarantees were asked for, this would mean that more money was to be advanced to defendants than they ever expected to repay. Such a fradulent intent the court does not find.

On the contrary, the court agrees with defendants that they viewed the mine and processing plant as legitimate business acquisitions.[13] Considering the extent of the real estate to be acquired, the apparent value of the ore deposits, and the production potential of the processing plant, it cannot be said that as a matter of law the amount of the offered loan, the inducement, was outrageous, excessive, or unreasonable.

On the sale-of-stock transaction it was proposed that the Williams group "roll over" their investment in the mine and processing plant by selling the package to a different Arab businessman for the price of $170 million. Out of that, of course, the initial $100 million to be advanced by the first sheik would have to be repaid. The ap-

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[13] As mentioned above in section II, defendants' criminal conduct arose out of their willingness to use and promise defendant Williams' influence and public position as an aid in getting government contracts for the output of an otherwise legitimate mining enterprise.

parent profit before taxes to defendants Williams and Feinberg would have been approximately $10 million each. Unquestionably, that is a substantial sum of money. In this court's view, however, for people such as defendants Williams and Feinberg who live and work in the top echelons of our society, the sum is not so excessive as to exonerate them from criminal responsibility in accepting the bribe.

F. *Miscellaneous Instances of "Outrageous" Conduct.*

Other instances of "outrageous" governmental conduct urged by defendants include Errichetti's forgery of defendant Williams' signature to a letter, Weinberg's alleged forgery of certificates of deposit that he provided to William Rosenberg, the FBI's agreement with the Chase Manhattan Bank for the bank to tell anyone who inquired that the sheik had a substantial deposit, and the use of an informant such as Melvin Weinberg in any investigation. The government's use of Weinberg, the Rosenberg certificates of deposit, and the Errichetti forgery have been fully discussed in the *Myers* opinion. *Myers* opinion 527 F.Supp. at 1235, 1240-1242. They need not be reviewed again, and they do not form a basis for dismissal of this indictment. Nor does the Chase Manhattan Bank's "gross deception", Williams memorandum at 46, affect the due process rights of these defendants, who do not even claim that they had direct knowledge that the sheik's funds were on deposit until after knowledge of the Abscam investigation became public.

G. *Cumulative Effect.*

Defendants have argued not only individual instances of claimed outrageous conduct by the government, but they also urge that, when combined, the various instances have a cumulative effect which amounts to outrageousness. The court is not convinced. As indicated above, many of de-

fendants' arguments are not factually supported by the record; other instances that did occur did not prejudice any rights of the defendants. Whether viewed as separate instances or in its totality, the conduct by the government during its investigation does not constitute outrageousness that would require dismissal of the indictment under applicable Supreme Court precedents.[14]

IX. CLAIMED MISCONDUCT BY GOVERNMENT AT TRIAL

Defendants urge several points designed to show that the government engaged in persistent misconduct during the course of the trial.[15] They urge that the government improperly introduced evidence of the activites of defendant Williams with respect to the Ritz Casino and a permit for the Biocel Corporation; they argue that the government intentionally misrepresented at trial the purpose for introducing a second group of Arab businessmen to purchase the titanium venture; they object to the prosecutor's references to defendant Feinberg as defendant Williams' "bag man"; and they criticize certain comments made during the government's summations.

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[14] It should be noted that to a significant extent, defendants are really urging the court to adopt an objective view of entrapment, in violation of controlling precedent. This the court has previously refused to do, and still refuses. Defendants Williams and Feinberg urge two specific claims. (1) Was the government's conduct "outrageous"? and (2) If not, did the government establish beyond a reasonable doubt that defendants were predisposed to commit the crimes? In section VII the court answers the "outrageousness" question in the negative. At trial the jury found predisposition, that negated entrapment, and in section VII of this decision the court finds the evidence supporting the jury's finding of predisposition to be legally sufficient.

[15] These arguments are to be distinguished from defendants' "outrageousness" argument, discussed in section VIII, which is directed at claimed misconduct during the course of the investigation.

A. *Ritz Casino Evidence.*

Defendants argue that evidence of their involvement in obtaining a permit for the Ritz Casino was improperly offered for two reasons. In the first place, they contend that the evidence could not show *pre* disposition since it occurred in 1979, *after* the investigation had begun. Assuming that the titanium mine and Ritz Casino projects proceeded simultaneously, nothing in the law of entrapment would preclude at the titanium trial evidence of defendant Williams' other attempts to use influence on public officials, whether made before, during or after the titanium events. Logically, such evidence is relevant to Williams' state of mind; absent a claim that somehow the Abscam investigators also induced defendant Williams' overtures to members of New Jersey's Casino Control Commission, a claim not made here, such conduct is legally admissible to show defendants' motive, opportunity, intent, preparation, and method of operation. F.R.E. 404(b).

Secondly, defendants argue that it was improper for the government to use evidence of Williams' activities with Lordi, because the government had in its files memoranda acknowledging that the officials in New Jersey had been unable to corroborate or confirm the investigative lead. This argument conveniently overlooks, however, the source of the evidence that Williams and Feinberg attempted to influence a decision by the Casino Commission. That evidence was a taped conversation in which Williams and Feinberg told of, indeed, bragged of their contacts with commission members and of the results which had followed. Gov't ex. 24A. It may be that the commission members that were claimed to have been approached, do actually deny that the events occurred. It may also be that in a prosecution against the commissioners there would be insufficient evidence to establish guilt. The government's evidence here, however, consisted of direct admissions by Williams and Feinberg,

admissions made under circumstances that were designed to impress the listeners with their know-how, their awareness of political reality, their ability to achieve results, and their willingness to use the Senator's influence for financial gain. In such circumstances there is no unfairness in using the defendants' own voluntary statements as evidence against them.

In one of their memoranda, Plaza and Weir analyzed the evidence about Williams' participation in the Ritz Casino application. DP ex. 24. At page 9 they conclude: "there is no evidence that Williams made such inquiry or recommendation to Lordi." Of course, Plaza and Weir did not have the benefit of Williams' trial testimony that he "thought" he had contacted Lordi on the subject; but in concluding that there was "no evidence", they do seem to have disregarded that Williams and Feinberg jointly made the videotaped admissions.

Evidence of the Ritz Casino activities was relevant on the issue of defendants' predisposition at the trial. In a conference whose record was sealed, the court explained its evaluation of the arguments under F.R.E. 403 and 404(b); there is no need to repeat that evaluation here. In sum, however, defendants did not establish that the relatively high probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

B. *Biocel Evidence.*

In a similar vein, although of less dramatic impact, was evidence about defendant Williams' attempting to use influence with certain local officials in connection with obtaining a permit by the Biocel Corporation in which defendant Williams had an undisclosed interest. Since those transactions were not tape recorded there were sharp questions of credibility over this issue. Assuming the government's evidence to have been true, however, the legal analysis here is simlar to that with respect to the Ritz Casino, and under the balancing test

required by FRE 403, the evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice.

Defendants also argue that the government failed to fulfill its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), in conection with the Ritz Casino and Biocel matters. The flaw in this argument, however, is that defendants were already aware of any material that would have been admissible in evidence. The argument is directed to prosecution memoranda and claims that investigations by other governmental agencies failed to produce indictments in those maters. Evidence of the prosecutors' opinions is not admissible, nor would be memoranda embodying those opinions. The witnesses who were involved in the activities were known equally to both sides. Since the government's claim with respect to the two transactions was also known to defendants, the witnesses who could have testified on the issues were equally available. In fact, defendant Williams did call some witnesses to testify on the transactions. Consequently, the argument based on *Brady* is rejected.

C. *The Purpose For the Resale "Stall".*

Pointing to the government's opening statement, defendant Williams claims the prosecution invented a story of a "fictitious stall" to explain why the investigation of defendant Williams continued after he took the stock certificates on August 5, 1979. The undercover operators had promised a loan of $100 million, which, of course, they did not intend to produce. According to the government, the Abscam investigation was continuing in other areas and, therefore, could not then be terminated.

Defendant argues that the government presented no evidence to support the claim made in its opening statement; that the reason for the "stall" was false; that the true reason was because the government's case against Wil-

liams was insufficient; and that there was no good faith basis for the government's opening statement.

If the government failed to present evidence on an essential aspect of the case, this could have been grounds for dismissal of a charge, and it certainly was fair argument to the jury about the strength of the government's case. For defendant to suggest, however, that there was no good faith basis for the goverment's opening statement is frivolous.

The sequence of the events undercuts defendants' argument. At about the same time that defendant Williams accepted stock, in August, 1979, the Abscam investigators began a series of bribe transactions with congressmen that continued up into January of 1980. In order to complete those transactions the agents had to keep "Abscam" undercover. Moreover, the resale of the titanium project was first suggested to defendants in September of 1979, some two months before the November 19th meeting when, defendants argue, the need for a "stall" arose.

Both in this context and others, defendants misplace their reliance upon the internal FBI memorandum of November 27, 1979, which summarized the meeting of November 19. After reviewing the status of the Abscam investigation, certain conclusions and recommendations were reached by the relatively large group that had been assembled for the purpose. Among that group were those from New Jersey who insisted that there was no case at all against Senator Williams.

The recorded conclusion of the meeting was that it was "necessary to re-contact U.S. Senator Williams" for two purposes: to obtain a commitment that he would sponsor legislation relating to the titanium mine and to confirm that Williams wanted his shares hidden. The memo concludes that "if" such information was obtained "prose-

cutors at the meeting" felt that they could prove Williams guilty of bribery and conspiracy. The court does not construe the word "necessary" and the conditional "if" to be binding limtations upon the government's ability to act upon information that was already in its possession, or upon other, additional information they might discover. The meeting must be viewed in the context of a sharp division within the justice department, not only between the Brooklyn and New Jersey prosecutors, but also with respect to the claims by the Philadelphia prosecutor that he should be given an opportunity to develop an Abscam case there.

Clearly, the Brooklyn prosecutors did not feel that the recontact was "necessary", even though they may have viewed it as a desirable means of strengthening their case. Clearly, too, those with veto authority over the prosecutions did not view the conditional "if" in the memorandum to be a binding limitation that would prevent prosecution unless the designated information was obtained, because the information was not obtained and those same people ultimately approved the prosecution anyway.

A more balanced view of the November 19th meeting and its ensuing November 27th summarizing memorandum is that the wording of the memorandum was designed to confirm agreement upon some future action with respect to defendant Williams that would be taken, without imposing limitations either upon the investigation or upon the eventual prosecution.

At bottom, defendants' argument contends that unless everyone on the government's side agrees that the available evidence makes out a case, a subsequent indictment and conviction based on that evidence violates some right of the defendant. Such has never been the law. Prosecutors frequently disagree with each other about the weight and sufficiency of evidence, just as they do with defense attorneys and, on occasion, with judges.

Nor can it seriously be argued, as do defendants and others, that the internal disputes of the justice department were proper evidence for the jury's consideration. Such discussions and their related memoranda constitute protected work product because they reflect counsel's analysis and opinions concerning the case. Some of those disputes have subsequently been disclosed in these and other due process hearings. Such disclosures were permitted in order to plumb the utmost depths of defendants' claims. However, those opinions and the memoranda embodying them were not relevant to any of the specific issues the jury was called upon to decide in this case.

In short, neither the document nor testimony about the meeting was admissible at the trial, because opinions of government counsel about the strength or weakness of their case are irrelevant to the jury's determination of guilt and innocence. The rule could not properly be otherwise. Indeed, if the prosecutor's opinion that he had a weak case was admissible for jury consideration, in fairness so also should be his opinion that he has a strong case. Clearly, such considerations are improper as evidence for jury evaluation. When expressed in summations they are unprofessional and, possibly, grounds for reversal. Worst of all, if admitted into evidence, such opinions would not only make witnesses out of prosecutors,[16] but they would distract the jury from their essential role in the criminal process: determining guilt or innocence based upon the evidence.

D. Feinberg as "*Bag Man*".

Defendants vigorously protest the government's characterization of Feinberg as defendant Williams' "bag man". Defendant Williams' complaint about use of the

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[16] The Canons of Ethics strongly discourage the trial attorney from being a witness at trial. *See* ABA Code of Professional Responsibility and Code of Judicial Conduct. DR 5-102.

term is focused upon the government's brief on the post-trial due process hearing. Defendant Feinberg complained about use of the term in the government's summation.

Codefendant and co-conspirator Errichetti originally tacked the label on Feinberg in a recorded conversation with Amoroso and Weinberg on March 24, 1979. Gov't ex. 3A. When the characterization first came up at the trial it was in the context of testimony by a government witness that Errichetti had referred to Feinberg as Williams' "bag man". Defendants' objection to the characterization was sustained, and the jury was told to disregard it. The reasons for the ruling were that Errichetti's opinion was of little probative value, his credibility was seriously suspect, and there seemed to be no need to add to what was already in evidence on the tape.

No further mention of "bag man" occurred until as the first question on Feinberg's direct examination, his attorney asked.

> Mr. Feinberg, are you now, or have you ever been Senator Williams' bagman? Tr. 3540.

Feinberg, of course, denied, the characterization. On cross-examination, the government's attorney explored Feinberg's understanding as to what a "bag man" is, and as to the relationship between an influential politician and his bag man. Essentially, Feinberg testified that the term has corrupt connotations, that a bag man is someone who would accept money on behalf of a public official and funnel that money to him, and that a bag man basically is someone who is out front for a public official, who saves the public official from certain contacts and exposure. Tr. 3794-96.

Given Feinberg's own explanation of the term before the jury and the evidence with respect to the relationship between Feinberg and Williams, coupled with their specific statements and conduct in this case, it was fair argument to the jury that Feinberg fit his own definition

of the term and that he was, indeed, Senator Williams' "bagman". *A fortiori* the government's characterization of Feinberg in a post-trial memorandum as the "bag man" for Senator Williams, is not improper.

E. *Summations.*

Defendants attack the government's summations as being improper and unprofessional, and argue that they constitute a basis for a new trial. They rely particularly on the Second Circuit's recent decision in *U.S.* v. *Modica*, 663 F.2d 1173 (1981).

In light of the arguments presented, the court has reviewed the summations by government counsel and finds no impropriety warranting corrective action. *Modica* underscores the ethical principle that an attorney should not vouch for the credibility of his own witnesses. However, the line between vigorous argument over credibility and improper "vouching" is not always easy to draw. Moreover, there are practical differences in the impact of an argument in support of one's own witnesses and an argument that attacks those of the adversary.

Modica did not intend to stultify effective argument. A variety of sanctions against improper argument are suggested there, but defense counsel in this case sought at trial, and still seek only the most drastic—a mistrial. With one exception, not relevant here, there was no objection to the prosecutor's remarks when they were made. Only at the conclusion of summation was an objection raised.

The closing arguments of all counsel in this case were spirited, vigorous, robust, and hard-hitting. They focused the issues clearly for the jury. Central to the case were the credibility of defendant Williams, of defendant Feinberg, and of Sandy Williams, the government's immunized witness. The essence of the government's case was that the true conduct and intent of defendants Wil-

liams and Feinberg could be determined from their statements on the tape recordings. When each of them testified at the trial they attempted to explain what they had said, what they had done, and why they had done it—all in non-criminal terms. The government contended that both were lying at the trial. The prosecutor pulled no punches; he called a lie, a lie. In attacking Sandy Williams, defendant Williams' attorney did the same. "Lie" is an ugly word, but it is appropriate when it fairly describes the ugly conduct it denotes.

In this court's judgment, the combined effect of all counsels' arguments at the end of this long trial was one of sharp conflict over the issues, a painstaking clarification for the jury of the essential points of dispute, and a demonstration of the adversary process functioning at its best. Throughout, the prosecutor's arguments were supported by the evidence, constituted fair comment on the evidence, and were conducted in a professional, ethical, fair and constitutional manner. Defendants' motions for a new trial on this ground are denied.

X. CONCLUSION

The central inquiries running through all of the "due process" issues were whether defendants were treated fairly, whether the trial was conducted in accordance with established principles of fairness and constitutionality, and, ultimately, whether the jury's verdicts of guilty were just. On the entire record it is clear that defendants entered on a course of conduct knowingly and voluntarily, and that before committing the criminal acts charged against them they were aware that corrupt use of Senator Williams' political influence and power was to be an essential part of the titanium deal. While the anticipated profit was substantial, the inducements offered by the government did not make irrelevant the defendants' predisposition to commit the crimes. Their predisposition having been found by the jury on evidence

that is not only sufficient but convincing, the determinations of guilt are proper.

The court has found no merit in defendants' arguments of governmental misconduct sufficient to warrant either dismissal of the indictment or a new trial. This applies not only to the arguments specifically discussed in this decision, but a variety of additional arguments raised in the papers submitted, all of which have been considered and found wanting by this court.

Accordingly, defendant Feinberg's motion for judgment of acquittal on count 5 is granted. All other motions by defendant Feinberg and by defendant Williams are denied. Defendants shall appear for sentencing at the Long Island Courthouse on January 26, 1982 at 1:30 p.m.

SO ORDERED.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April one thousand nine hundred and eighty-three.

Present:

HON: HENRY J. FRIENDLY
HON: JON O. NEWMAN
HON: AMALYA L. KEARSE

Circuit Judges

82-1111

82-1123

UNITED STATES OF AMERICA,
Appellee,

v.

HARRISON A. WILLIAMS, JR.
and ALEXANDER FEINBERG,
Defendants-Appellants.

[Filed Apr. 5, 1983]

Appeal from the United States District Court
for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by: /s/ Edward J. Guardaro
EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX D

Order denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and eighty-three.

82-1111

82-1123

UNITED STATES OF AMERICA,
Appellee,

v.

HARRISON A. WILLIAMS, JR.,
and ALEXANDER FEINBERG,
Defendants-Appellants.

[Filed May 24, 1983]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Harrison A. Williams, Jr.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge

on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk

by: /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX E

Charge of the trial court on entrapment

T 5572-80, 5700-07

The fifth element is that the defendant was not the victim of entrapment. Each defendant claims that he was the victim of entrapment as to each of the offenses charged in the indictment, including this bribery offense of count two. Entrapment is a legal term. It has a technical meaning which is different from that of popular speech or ordinary usage; therefore, I must explain the meaning of entrapment as the term is used in its legal sense.

The term entrapment means that law enforcement officials, acting either directly or through an agent such as Melvin Weinberg here, induced or persuaded an otherwise unwilling person to commit an unlawful act. The fact that the government officials or their agents merely afforded opportunity to one who is ready and willing to violate the law when the opportunity presents itself, does not constitute entrapment; however, in their efforts to enforce the laws, government officials and their agents may not entrap an innocent person who, except for the government inducement, would not have engaged in the criminal conduct charged. Entrapment occurs only when the criminal conduct was the product of the creative activity of the law enforcement officials or their agents; that is, if they initiate, entice, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct, the government may not obtain a conviction based upon the fruits of that instigation. In this case, entrapment must be determined separately for each of the defendants.

From the evidence in this case, it is clear that the law enforcement officials set up Abdul Enterprises and, through Anthony Amoroso and Melvin Weinberg and others, conducted what has been called the Abscam Operation. They let it be known through Angelo Errichetti

and others that they had large sums of money to invest, and they told defendant Williams and his co-venturers that a condition of the loan and the later stock purchase was that defendant Williams use his influence as a senator to obtain government contracts for purchasing the titanium. Given these circumstances, there is, of course, some evidence in the case that it was at least in part the activity of law enforcement officials that induced defendant Williams to attend the various meetings and discuss the proposed transactions for purchase of the titanium mine and processing plant.

Under the law of entrapment, therefore, that leaves for you, the jury, to determine as the decisive question on this entrapment issue whether the defendant was predisposed to commit the crime; that is, whether he was ready and willing to commit a crime such as charged here whenever a favorable opportunity was offered.

To sustain its burden of proof the government has to satisfy you that its agents have not induced an innocent person, but that the inducement which brought about the offenses charged simply brought about another instance of the kind of conduct which the defendant was prepared to engage in, if offered an opportunity which appeared favorable. Thus, if the prosecution has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged whenever a favorable opportunity was offered to commit them, then you may find the government did no more than furnish a convenient opening for the criminal activity in which the defendants were prepared to engage.

You may find that one of the defendants was not the victim of entrapment while deciding that the other was. Each defendant's assertion of entrapment must be considered without regard to your conclusion to the other's entrapment claim.

In determining whether either defendant, if afforded a favorable opportunity, was predisposed to engage in the

kind of criminal activity for which he is charged, you should look to the totality of the circumstances shown by the evidence, including the nature and extent of the inducement offered. In weighing the circumstances to determine this issue of predisposition, you may consider, among other things, the impact that the conduct of the government agents had on the defendant, both directly and indirectly through its effects on the alleged co-conspirator Sandy Williams, George Katz, and Angelo Errichetti. The central question for each defendant on this entrapment issue focuses on his own state of mind to be determined from all the circumstances. Was he predisposed to commit the crime? Predisposition may be shown in one or all of the following ways.

First, you may find that either defendant was predisposed to commit the offenses charged by evidence that satisfies you that the defendant had already formed a design to commit the offense before there was any inducement by an agent of the government.

Second, you may find that a defendant was predisposed to commit the offense charged from the manner in which the defendant reacted or responded to the government's inducement and to the general conduct of the government agents. In other words, did the defendant hesitate? Was he reluctant to take the stock, or receive a loan, or receive the proceeds from the sale of the mining venture? Or, did he readily agree to the agents' proposals?

Third, predisposition may be established by evidence of an existing course of conduct similar to the conduct that forms the basis of the charges in the indictment. Such prior contemporaneous conduct need not be criminal. Rather, for purposes of considering evidence of prior acts on the issue of entrapment, the prior conduct may be weighed, if you find that it was similar to the conduct that forms the basis of the present charges.

In this connection, counsel have reviewed with you various matters in evidence such as the Ritz Casino transactions, the Economic Development Authority's proposed loan to Biocel of Sussex County, the discussions about assisting the sheik in immigrating to and residing in this country; the claimed agreement by defendant Williams to accept the offer of $20,000.00 for expenses, and certain other matters. Keep in mind in this connection there is no evidence connecting defendant Feinberg with either the E.D.A. loan to Biocel or to the alleged $20,000.00 in expense money offered by the sheik.

Also, in this connection, you may recall some evidence to the effect that defendant Williams' office in Camden is in defendant Feinberg's office building. Such a lease is worked out through the Senate's Sergeant of Arms and should not be weighed by you as any evidence of predisposition. That evidence was offered and should be considered by you only as background evidence with respect to the relationship between defendant Williams and defendant Feinberg.

Counsel have argued to you about the inferences to be drawn from the evidence with respect to predisposition. You should consider that evidence and consider those arguments carefully.

Finally, in deciding predisposition, you may also weigh and consider the evidence of each defendant's reputation and character, and any other matter in evidence which tends to show whether or not the defendant was ready and willing to commit any of the crimes charged.

The defense of entrapment is based upon the policy of the law not to ensnare or entrap innocent persons into the commission of a crime. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. Law enforcement officials are not precluded from using artifice, stealth and stratagems such as the use of decoys, and undercover agents,

in order to apprehend persons engaged in criminal activity, provided they merely afford opportunities or facilities for the commission of offenses by those who are ready to commit them. Law enforcement officials may properly make use of undercover operations in which they assume false names and false appearances. They may properly assume the roles of members of fictitious organizations. They may properly offer or give to the defendants the money, stock, loans or other things of value that are involved in the commission of the offense itself, and they may properly instigate the offer of money, stock, loans or other things of value to a defendant.

Whether you approve or disapprove of these or other practices engaged in during the Abscam investigation should not enter into your deliberations. Your function is to decide whether you are satisfied beyond a reasonable doubt that each defendant was predisposed; that he was ready and willing to commit the offense charged.

You have heard the evidence and arguments of counsel. You must determine for each of the crimes whether the government has established this element, that the defendant was not a victim of entrapment, and you will decide that by determining whether the government has established that the defendant was predisposed to commit the crime.

* * * *